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Supreme Court of the United States

October Term, 1974

No. 74-3791

STATE OF OHIO,
Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Tenth Circuit

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OPINION OF THE TENTH CIRCUIT COURT OF APPEALS

(Filed August 13, 1974)

Nos. 73-1781, 73-1782, 73-1783, 73-1784

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

Appeals of:
ARTHUR ANDERSEN & CO.; JACK L. CLARK; GORDON H. McCOLLUM; WALSTON & CO., INC.; MONTGOMERY CO., and GLENN R. MILLER,
Appellants,

vs.

STATE OF OHIO,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(M.D.L. 55)

Before LEWIS, *Chief Judge,* McWILLIAMS and BARRETT, *Circuit Judges.*

LEWIS, *Chief Judge.*

This appeal probes the interrelationship between Rule 23 class actions and Rule 60 relief from judgments. It follows the granting of such relief to the state of Ohio

after the judgment on a class-action settlement and arises as yet another offshoot of the complex litigational network that has been constructed around securities issued or guaranteed by Four Seasons Nursing Centers of America, Inc. or Four Seasons Equity Corporation.[1] The transactions relevant here involve $4,000,000 in loans made by Ohio to Four Seasons Nursing Centers of America. The facts surrounding the execution of these loans are set out in *Ohio v. Four Seasons Nursing Centers of America,* 10 Cir., 465 F.2d 25, at 26, 27 as follows:

> In early 1970, Mr. Jack L. Clark, the president of Four Seasons, received information that a Mr. Ronald R. Howard of Los Angeles, California, was in a position to assist Four Seasons in borrowing needed funds for continued operation and expansion. Howard and Clark conferred in Oklahoma City for the purpose of consummating an agreement for the procurement of funds. It was anticipated that Four Seasons would borrow between $20,000,000 and $24,000,000 from the State of Ohio. Howard contacted Crofters, Inc., a Columbus, Ohio, investment firm. Mr. Harry A. Groban, the executive vice president of Crofters, requested a credit rating on Four Seasons from the National Credit Office, a division of Dun and Bradstreet. An employee of the National Credit Office procured the latest annual report of Four Seasons, as well as other statements and bank information concerning that corporation from Mr. John Mee, a vice president of and attorney for Four Seasons. Based on this material, the National Credit Office gave Four Seasons a rating of "prime" for commercial paper.

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1. For a thorough account of the history of the Four Seasons companies *see* In re Four Seasons Securities Law Litigation (Opinion No. 2), (W.D. Okla.) 58 F.R.D. 19.

This information was communicated by letter to Groban; Groban in turn furnished the information to Mr. Robert F. Gardner, Deputy Treasurer of the State of Ohio.

Groban advised Mee that funds would be available to Four Seasons from the State of Ohio. Thereafter, Mr. Alex Russell, an officer of Four Seasons, went to Columbus, Ohio, to secure the funds. On March 9, 1970, Russell consummated a loan of $3,000,000 for Four Seasons with the State of Ohio through Gardner and in the presence of Groban. The loan was evidenced by two promissory notes of Four Seasons, one for $2,000,000 payable in 120 days and another for $1,000,000 due in two years. The $2,000,000 note was made on the basis of 120 days with the understanding that when due the note would be renewed for a period of two years. A second loan for $1,000,000 was advanced on March 23, 1970; a note for $1,000,000 payable in two years to the State of Ohio was executed on that date.

Ohio subsequently sought reclamation of these funds against the Trustee in the Chapter X reorganization proceedings of the Four Seasons companies. It charged, *inter alia*, that Four Seasons had intentionally made material and fraudulent misrepresentations concerning its financial condition to the National Credit Office in order to obtain a prime rating, and that Ohio's loans had been made in reliance on this rating. The trial court found neither fraud nor misrepresentation, *In re Four Seasons Nursing Centers of America*, W.D. Okla., 329 F. Supp. 647, and was upheld on appeal. The appellate court also found Ohio's constructive trust argument unpersuasive and held that the evidence concerning procurement of the funds did not estab-

lish noncompliance with the applicable Ohio statute. *Ohio v. Four Seasons Nursing Centers of America,* 10 Cir., 465 F.2d 25.

Ohio filed three appeals from orders in the Chapter X proceedings. It was particularly opposed to those portions of successive plans of reorganization which resulted in one-third of the stock in the reorganized corporation (Anta) going to "Class G Creditor Stockholders." Ohio was designated a "Class C Creditor" (general unsecured creditor) and was permitted under the amended plan to receive one share of Anta stock for each $7 principal amount of allowed claims.

On May 21, 1971 ten actions—seven of which claimed to have been brought on behalf of all purchasers of stock of the Four Seasons companies who suffered a loss—were brought in or transferred to the Western District of Oklahoma and were assigned to Judge Thomsen by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. *In re Four Seasons Securities Law Litigation,* Jud. Pan. Mult. Lit., 328 F. Supp. 221. Numerous other cases were subsequently transferred. All together 40 individuals, partnerships, and corporations were named as defendants in one or more of the actions, which sought to be treated as class actions. In one or more of the complaints, claims were asserted against some or all of the defendants under §§ 5, 11, 12, and 17(a) of the Securities Act of 1933, under §§ 9, 10(b), and 20 of the Securities and Exchange Act of 1934, and under Rule 10b-5 of the SEC. The litigation proceeded as M.D.L. 55.

Meanwhile, in March 1972 the state of Ohio, through the office of the Attorney General, filed three suits:

(1) State of Ohio v. Crofters, Inc., et al., Civil Action No. 72-81, in the United States District Court for the Southern District of Ohio, Western Division. Among the several groups of defendants in that case were Clark, Gray, Mee, Andrews and McCollum, defendants in some of the M.D.L. 55 cases. The complaint includes eleven claims:

First Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

Second Claim—§ 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; § 29 (b) of the Exchange Act, 15 U.S.C. § 78cc(b).

Third Claim—§ 17(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1).

Fourth Claim—§ 17(b) of the Securities Act, 15 U.S.C. § 77q(b).

Fifth Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5.

Sixth Claim—§ 15(c)(1) of the Exchange Act, 15 U.S.C. § 78o(c)(1), Rule 15c1-2, 17 C.F.R. § 240.17c1-2; § 15(c)(2) of the Exchange Act, 15 U.S.C. § 78o (c)(2).

Seventh Claim—§ 1707.44(B)(4), § 1707.43, Ohio Revised Code.

Eighth Claim—§ 1707.44(G), § 1707.43, Ohio Revised Code.

Ninth Claim—§ 1707.14, § 1707.44(A), and § 1707.43, Ohio Revised Code.

Tenth Claim—§ 1707.41, Ohio Revised Code.

Eleventh Claim—Common Law Fraud.

Some of these statutory bases are the same as those in one or more of the M.D.L. 55 class actions; some are not.

Clark filed a counterclaim against Ohio in this case, third-party claims against Walston & Co. and Arthur Andersen & Co., and various cross-claims.

(2) State of Ohio v. Herbert, et al., in the Court of Common Pleas of Franklin County, Ohio.

This is an action against the Treasurer of the State, another official, and the sureties on their bonds, alleging violation of certain Ohio statutes and of the officials' duties. All of the defendants in State of Ohio v. Crofters, Inc., et al., have been brought into that case as third-party defendants.

(3) Shaul, Director of Commerce of the State of Ohio v. Crofters, Inc., et al., in the Court of Common Pleas of Franklin County, Ohio. Clark, Gray, Mee, Andrews, and McCollum are also defendants in that case, which is based on alleged violations of the Ohio Code, and seeks injunctive relief.

Negotiations took place in the spring and summer of 1972 which were aimed at the settlement of various claims, including those in the M.D.L. 55 actions, the actions of the Trustee of the debtor estates against many of the M.D.L. 55 defendants and the appeals of Ohio in the Chapter X proceedings. Various attorneys for the state of Ohio were aware of these negotiations and participated in one or more of the discussions, but no one moved to have State of Ohio

v. Crofters, Inc., in the Southern District of Ohio, transferred to M.D.L. 55 in the Western District of Oklahoma.[2]

In July 1972 Judge Thomsen states he was willing to enter an order in M.D.L. 55 which would, in effect, designate five actions as class actions and divide the plaintiffs preliminarily, and subject to the right to modify, into two classes for pretrial and discovery purposes. Ohio was a member of one of these classes. At this time all counsel present, which did not include counsel for Ohio, asked the court to hold up entry of the proposed order to permit them to continue settlement negotiations. The order was held up and negotiations continued until a settlement was reached and presented to the court on September 21, 1972.

It became apparent during these negotiations that settlement of Ohio's claims in the Chapter X proceedings was a prerequisite to the settlement of the Trustee claims in M.D.L. 55 because the plan for reorganization could not be carried out until Ohio's claims were settled. Toward this end attorneys for Ohio and the Trustee continued negotiations until a settlement was agreed upon on September 13, 1972. During the course of these discussions, the Ohio attorneys met with counsel for some of the M.D.L. defendants, although they did not meet with attorneys for the plaintiffs in that litigation. The Ohio attorneys were never told that Ohio was a member of one of the classes which the court had indicated would be preliminarily designated in M.D.L. 55 if settlement negotiations there fell through. Ohio's attorneys did not inquire about the M.D.L. 55 classes and no one volunteered the information to them.

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2. A motion to transfer that case was subsequently made to the Judicial Panel on Multidistrict Litigation, and the case was thereafter transferred by the panel to M.D.L. 55. *In re Four Seasons Securities Laws Litigation*, 361 F. Supp. 636.

Gretick, the attorney in charge of the case for Ohio, went to Oklahoma City on September 19 to work with Bailey, the Trustee's attorney, on the terms of the joint application for settlement in the Chapter X proceedings. Bailey left for Baltimore on September 20 and was present when the M.D.L. 55 settlement was reached and the order signed by the court on September 21. That order defined the Rule 23(b)(3) classes as follows:

> (a) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;
>
> (b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper.

Bailey returned to Oklahoma City on September 22 and completed work with Gretick on the joint application for settlement in the Chapter X proceedings that evening. He told Gretick that M.D.L. 55 "had been settled around Ohio." By the terms of the settlement Ohio received,

in addition to the Anta stock it received as a Class C Creditor, proceeds from the sale of valuable real estate. Ohio, in return, agreed to dismiss its pending appeals.

In addition to the designation of classes which, it is conceded here, included the state of Ohio,[3] the M.D.L. 55 order of September 21 included several other clauses pertinent to our consideration on appeal. Clause 19 preserved the rights of the M.D.L. 55 defendants to assert their claims and causes of action, including cross-claims and claims for contribution and indemnity, which related to or arose out of or in connection with the Ohio $4,000,000 loan and the litigation relating thereto. In addition, the order provided that claims of Class C Creditors in the Chapter X proceeding should be reduced to ten percent of the face amount of the securities on which their claim was based. This provision was in recognition of the fact that Class C Creditors had already received compensation through the Chapter X proceedings.

Finally, the order made it clear that the settlement was intended to include all claims which had been or could be asserted by or on behalf of the classes, or any member thereof, arising out of or relating to any act or omission concerning the Four Seasons companies, and other related or affiliated companies, or relating to the business, management or financial statements of any of the Four Seasons companies, or transactions in the securities or commercial paper of any of the Four Seasons companies, prior to the date of entry of the final judgment provided for in the order, whether or not asserted in the class actions. It barred forever the prosecution against the de-

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3. Ohio was a class member as holder of securities, as defined in the Federal Securities Laws, or commercial paper, or both.

fendants of any and all settled claims by any member of the classes, except by those who opted out.

Notice of the proposed settlement was published in the Wall Street Journal and two copies of the order, notice, and accompanying papers were mailed, one to Ohio, c/o the Attorney General, and one to William Brown, Attorney General. The return receipts indicated that the mailings were delivered to the office of the Attorney General, one on October 6 and the other on October 10, 1972. One set was subsequently discovered in Gretick's file. The other has not been located.

On October 12 Gretick was in Oklahoma City for hearings on the settlement of Ohio's claims in the Chapter X proceedings. He had not read the September 21 order or the notice. Bailey showed him a copy of the order. Gretick "riffled" through it and asked Bailey to mail him a copy. This was not done. Gretick left the Attorney General's office two weeks later and Ronald B. Brown was made lead counsel in the Four Seasons case. Late in October he saw the M.D.L. order of September 21, read the first page and thumbed through some additional papers, assuming that Gretick had done what was necessary. No election to opt out was filed by Ohio. Hearings on the M.D.L. 55 settlement were held on November 16 and 17, 1972. The judgment approving the settlement was signed November 30 and entered on December 4, 1972.

On December 5 counsel for Clark referred to the settlement during a pretrial hearing in State of Ohio v. Crofters, Inc., et al., and Brown then read the September 21 order in M.D.L. 55 for the first time. Ohio took no appeal from the judgment but on January 2, 1973 filed its motion for relief from judgment under Rule 60(b)(1),

(4), and (6).[4] The motion was granted and this appeal by affected M.D.L. 55 defendants followed.[5]

In granting Ohio's motion for relief, the court below examined each of the allegations presented under Rule 60(b)(1), (4), and (6). Ohio first claimed that its failure to opt out was the result of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1). The court was not persuaded by this claim. "If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent." 59 F.R.D. at 678. The court concluded, however, that Ohio negotiated with the Chapter X Trustee in the belief that it would not be included in the M.D.L. 55 classes and the attorneys for the Chapter X Trustee did nothing to dispel this belief. These circumstances, plus the statement of the attorney for the Chapter X Trustee "that the case had been settled around Ohio," explained but did not excuse Ohio's neglect. 59 F.R.D. at 679.

Ohio's Rule 60(b)(4) claim was that the judgment as to it was void. In this context the court considered the Rule 23(a)(3) requirement that the claims or defenses

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4. Rule 60. Relief From Judgment Or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (4) the judgment is void; * * * or (6) any other reason justifying relief from the operation of the judgment.

5. The court below entered an order, based upon Ohio's assurance that it would not file an appeal from the December 4 judgment, authorizing Ohio to file a contingent proof of claim under the M.D.L. 55 settlement. The proof of claim was to become null and void if Ohio's Rule 60(b) motion was finally granted, but would become fully effective and unqualified if the motion was denied.

of the representative parties must be typical of the claims or defenses of the class, the Rule 23(a)(4) requirement that the representative parties will fairly and adequately protect the interests of the class, and the Rule 23(c)(2) requirement that in any class action maintained under (b)(3) the members of the class must be given the best notice practicable under the circumstances. When these requirements are met, the court reasoned, due process is satisfied.

The court first found that the required notice was given (in fact two copies of the notice were actually received by Ohio) and then proceeded to examine the adequacy of representation and typicality questions. On the typicality issue, Ohio sought to distinguish its position from that of other M.D.L. 55 class members on grounds that (1) Ohio's loans were evidenced by promissory notes maturing in two years and that Ohio, unlike the other securities purchasers, was bargaining for interest return alone and not for any present or prospective equity in Four Seasons; (2) that its loans were privately negotiated through a finder-broker and required no registration statement, prospectus, other reporting, or professional underwriting group; and (3) that the promissory notes were represented to be commercial paper.

The court concluded that Ohio was included within one of the classes created in M.D.L. 55 because the promissory notes it acquired were securities within the meaning of the Federal Securities Act of 1933 and the Securities and Exchange Act of 1934. Reasoning that typicality does not require that claims of class representatives be "co-extensive with" or "identical to" those of other class members, the court pointed out that each member of the class purchased his security or securities in transactions separate from other class members and that the fact patterns for each necessarily varied. All relied on alleged misrepresentations em-

braced in the general conspiracy theory advanced by class representatives and covered by the alleged violations of the securities laws. After considering all of the evidence, the court found that "the claims of the class members were typical of the claims Ohio asserted in *State of Ohio v. Crofters, Inc., et al.*, and the third-party complaints against Clark and others in *State of Ohio v. Herbert et al.*, but were not typical of the claims asserted by Ohio in its complaint against Herbert, Gardner, and their sureties." 59 F.R.D. at 682.

Ohio's contention that it had not been represented adequately was premised on the same distinctions between its claims and those of the class representatives which were alleged in its typicality argument. The court found that these distinctions alone, again with the exception of the claims against Herbert, Gardner, and their sureties, did not demonstrate a lack of adequate representation. But when viewed in light of the ultimate terms of the settlement, which provided for the claims of Class C Creditors in the Chapter X proceedings to be reduced to ten percent of the face amount of the securities on which their claim was based and further reserved the rights of the M.D.L. 55 defendants against Ohio, the representation question became more troublesome. The court pointed out that none of the Class C Creditors was a class representative and that there was therefore some force to Ohio's contention that a Class C Creditor could not be adequately represented in the settlement. In addition, the court found that the provisions preserving the claims of the M.D.L. defendants against Ohio "were included with the expectation on the part of everyone that Ohio would opt out." 59 F.R.D. at 683. Finally, when these provisions and the differences between Ohio's claims and the claims of other class members were considered together, "Ohio has made a strong case that the

judgment should be held void as to all the claims of Ohio." Id.

Added to these factors, under Rule 60(b)(6), was the "lulling effect" which the court felt the dealings between the attorneys for Ohio and the attorney for the Chapter X Trustee had on Ohio's failure to opt out. The end result was that "the totality of the evidence required that Ohio be relieved from the operation of the judgment." Id.

This account of the lower court's decisional process is presented in some detail in order to demonstrate that the court did not pigeonhole its basis for relief into any particular one of the Rule 60(b) categories. Reliance to some extent was placed on 60(b)(1), (4), and (6) and our appellate review cannot be conveniently telescoped. We must therefore consider whether, under all of the circumstances, the relief granted was justified.

We must at the outset dismiss appellants' contention that the provisions of Rule 60(b)(1)-(5) and 60(b)(6) are mutually exclusive and that the court below misapplied the rule in apparently aggregating claims under 60(b)(1), (4), and (6). It is true that the weight of authority indicates that a Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1) - (5). *Klapprott v. United States*, 335 U.S. 601; *United States v. Karahalias*, 2 Cir., 205 F.2d 331 (on rehearing); and 7 Moore's Federal Practice ¶ 60.27(1). But it is also clear that this rule stems of necessity from the one-year time limitation which attaches to motions for relief under 60(b)(1) - (3). Rule 60(b)(6) requires only that the motion be made within a "reasonable time" and it would obviously frustrate the one-year limitation if a 60(b)(6) motion could be brought after this period for reasons articulated in 60(b)(1) - (3). The cases support this interpretation of

the exclusivity rule, and motions timely brought under Rule 60(b) have encountered little technical difficulty as to whether the motion in fact comes under clause (6) or one of the earlier clauses. *Laguna Royalty Co. v. Marsh*, 5 Cir., 350 F.2d 817; *Rooks v. American Brass Co.*, 6 Cir., 263 F.2d 166; 11 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2864, at 212. Where, as in the case at bar, the motion is timely filed under any of the 60(b) clauses, the court should not be bound by a strict categorization of particular claims. We thus do not consider it necessary to attempt to pinpoint which, if any in particular, of the 60(b) clauses formed the basis for the decision of the court below.

When viewed in its entirety, it is apparent that the real basis for the court's decision below, notwithstanding the analysis directed to particular clauses under Rule 60, was its belief that under all of the circumstances presented Ohio was simply denied due process of law. The court in essence concluded that the aforementioned clauses in the settlement agreement reflected an inadequacy of representation which, at least with respect to the claims against Herbert, Gardner, and their sureties, was predetermined through the lack of typicality of those claims under Rule 23(a)(3). It is interesting to note in this latter respect that at least one court has stated that the typicality requirement was "designed to buttress the fair representation requirement in Rule 23(a)(4)." *Rosado v. Wyman*, E.D. N.Y., 322 F. Supp. 1173, 1193, *affirmed on other grounds*, 2 Cir., 437 F.2d 619, *affirmed*, 402 U.S. 991. This view, of course, comports with common sense in that atypical claims presumably could not be adequately represented by a class representative unfamiliar or unconcerned with their peculiar characteristics.

We are supported in our view that the lower court's decision was based upon due process considerations[6] by the fact that the major claims of Ohio were asserted and addressed under the Rule 60(b)(4) voidness of the judgment clause, and a judgment is not void merely because it is erroneous, but only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law.[7] 11 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862, at 199, 200. Jurisdiction not being challenged, the judgment could be attacked as void only on due process grounds and, indeed, the court couched its 60(b)(4) consideration in terms of due process. 59 F.R.D. at 679.

The touchstones of due process in class actions have always been notice and adequacy of representation, but their interrelationship has never been completely and clearly articulated. Assuming the conclusion of the court below on the adequacy question to be correct, we must at the outset determine what if any impact the notice provided to Ohio had on its standing to argue a denial of due process under Rule 60(b).

The landmark due process decision in class action law is *Hansberry v. Lee*, 311 U.S. 32. In that case the Supreme Court refused to give res judicata effect to a state court decision against certain ostensible class members who had not received notice and had not been adequately represented. The Court's due process analysis was centered around the question of adequacy of representation

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6. The "lulling effect" must be seen as only one more factor in the due process determination, especially in view of the fact that Ohio's neglect was deemed, properly we think, inexcusable under Rule 60(b)(1).

7. *Bass v. Hoagland*, 5 Cir., 172 F.2d 205, *cert. denied* 338 U.S. 816.

and the decision has subsequently been interpreted to establish adequate representation as a prerequisite for due process in class actions.[8] *See, inter alia, Gonzales v. Cassidy,* 5 Cir., 474 F.2d 67; *Northern Natural Gas Co. v. Grounds,* D.Kan., 292 F. Supp. 619; *Dolgow v. Anderson,* E.D.N.Y., 43 F.R.D. 472. It is important to note, however, that these cases are distinguishable from that presented here in that they involved either actions brought under sections other than 23(b)(3), with its built-in opportunity to opt out, or determinations as to whether a class action should be maintained in the first instance.[9] The present case involves a unique factual situation and requires a closer consideration of due process requirements.

In 1966 class action procedures were revised under Rule 23(c)(2) with respect to actions, such as the instant one, brought under Rule 23(b)(3). Recognizing the unique availability of exclusion under 23(b)(3) actions, the revised rule requires that the best practicable notice under the circumstances be sent to the members of the class advising them of their right to opt out or to enter an appearance in the action through counsel. The resulting judgment, whether favorable or not, will bind all members who then

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8. It is not entirely unfair to characterize this interpretation as overly broad. The Court did not say that both notice and adequate representation were necessary to satisfy due process. It is entirely feasible that the Court reached the adequacy issue because no notice had been given and was willing to enforce the prior state decision if adequacy were present despite lack of notice. The question of whether notice itself would have been sufficient, it seems to us, was left unanswered. *See also, e.g., Schrader v. Selective Service System Local Board No. 76 of Wisconsin,* W.D. Wis., 329 F. Supp. 966, in which adequacy overcame the lack of notice.

9. In the *Gonzales* case, heavily relied on by Ohio, the court took pains to point out that the action was maintained under 23(b)(2) and not 23(b)(3) with its special notice requirements and opt-out provisions. "As a result of these distinctions class members in (b)(1) and (b)(2) actions must necessarily rely on the representative to protect their interest." 474 F.2d at 74 n. 12.

fail to exercise the option to be excluded. By requiring this affirmative action by the absentee, the rule seeks to eliminate "one-way intervention," a practice common in "spurious"[10] class suits prior to 1966. *Shane v. Northwest Indus., Inc.*, D.C. Ill., 49 F.R.D. 46; *State of Minnesota v. U.S. Steel Corp.*, D.C. Minn., 44 F.R.D. 559.

While adequacy of representation has been upheld as an extremely important factor in due process considerations in class actions and has, in fact, been deemed a prerequisite thereto under most circumstances, we do not feel bound in the instant proceeding by *Hansberry* and its progeny. For we consider here an action in which Ohio not only received notice of its inclusion within the designated class, with the concomitant right to opt out, but one in which Ohio was also apprised of the very terms of the impending judgment. It was thus presented with the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied. We do not feel that due process requirements under the facts presented here have yet been articulated.[11]

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10. A "spurious" suit was one in which the action was based solely on common questions. The judgment bound only the named parties and those who joined. 7A WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURES § 1777, at 45. "One-way intervention" occurred when courts permitted absent parties to intervene after a decision favorable to their interests, even though an unfavorable decision would not have bound them.

11. In the recent case of *Eisen v. Carlisle & Jacquelin*, No. 73-203, dec. May 28, 1974, the Supreme Court extended the Rule 23(c)(2) best-practicable notice requirement to all 23(b)(3) class members who can be identified through reasonable effort. In response to the contention that adequacy of representation, rather than notice, was sufficient for due process, the Court responded: "We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." The decision, however, preceded any judgment and concerned the question of whether the action could be maintained, and is thus, like the previous cases cited, factually distinguishable from this controversy. Moreover, the Court speaks to the requirements of the *rule*, and not the Constitution.

We are constrained to conclude that due process was satisfied here when Ohio received the notice and order delineating the terms of the proposed settlement and informing Ohio that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out. In such a case, we conclude that due process may be satisfied by notice alone and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity.

In reaching this conclusion we are guided by the purpose of the rule to prevent one-way intervention, the interests in the finality of judgments, and related case law precedent. To uphold the decision of the court below would, in our opinion, offer "a return to one-way intervention under a new guise." *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459. *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARVARD LAW REVIEW 589, 601. Defendants would be placed in the difficult position of having to go through complex litigation a second time against parties that would have participated in the judgment had it been favorable to them and, as appellants contend happened in the present case, the same arguments may be used against them which they had previously urged when they originally challenged the maintenance of the class action. The purpose of class actions is to avoid multiplicity of suits and upholding the decision of the court below would frustrate not only the interest in finality of judgments but also the interest in settlement of complex litigation.

Finally, we note that this is not the first time that a class member with notice has been bound by a judgment after failing to take some affirmative action. *See Brennan v. Midwestern United Life Ins. Co.*, 7 Cir., 450 F.2d 999;

Mungin v. Florida East Coast Ry. Co., M.D. Fla., 318 F. Supp. 720; *School District of Philadelphia v. Harper & Row Publishers, Inc.*, E.D. Pa., 267 F. Supp. 1001; *Supermarkets General Corp. v. Grinnell Corp.*, S.D. N.Y., 59 F.R.D. 512, *affirmed*, 2 Cir., 490 F.2d 1183. In *Research Corp. v. Asgrow Seed Co.*, 7 Cir., 425 F.2d 1059, appellants, who had not been named class defendants but who had received notice, sought to appeal from a class settlement judgment. Appellants did not intervene or object to the settlement and the appeal was dismissed for reasons which we find particularly pertinent here:[12]

> However, in order to encourage or even to permit settlement, a person in disagreement with the terms of a settlement must take, at least, these minimal steps to preserve his right to appeal. Accordingly, since appellants had both actual and constructive knowledge of the settlement and since they took no steps to object to the settlement prior to the entry of judgment, the appeal must be dismissed. 425 F.2d at 1060-61.

We find for similar reasons that the Rule 60(b) relief sought in the court below should have been denied. Under the particular facts here presented there has been no denial of due process.

The case is reversed and remanded with instructions to reinstate the judgment.

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12. In *Ace Heating & Plumbing Co. v. Crane Co.*, 3 Cir., 453 F.2d 30, the court considered the same issue as that presented in *Research Corp.* but concluded that it was not dispositive on the facts presented because appellants were members of a class so small that they had no litigable claims unless aggregated and that for those so situated the option to join in or opt out is in reality no option at all. They must accept either nothing at all or a possibly unfair settlement, the court held, and thus had standing to appeal. No such mitigating circumstances are present here.

JUDGMENT OF THE TENTH CIRCUIT

(August 13, 1974)

Nos. 73-1781, 73-1782, 73-1783, 73-1784

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

Appeals of:
ARTHUR ANDERSEN & CO.; JACK L. CLARK; GORDON H. McCOLLUM; WALSTON & CO., INC.; MONTGOMERY CO.; and GLENN R. MILLER,
Appellants,

vs.

STATE OF OHIO,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(M.D.L. 55)

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of the United States District Court for the Western District of Oklahoma is reversed. The cause is remanded with instructions to reinstate the judgment.

/s/ Howard K. Phillips
Clerk

OPINION OF THE DISTRICT COURT DESIGNATED "OPINION NO. 4"

(Dated June 7, 1973)

M.D.L. Docket No. 55

UNITED STATES DISTRICT COURT
For the Western District of Oklahoma

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

MOTION OF OHIO FOR RELIEF FROM JUDGMENT

THOMSEN, *District Judge.**

The State of Ohio seeks relief under Rule 60(b), F.R.Civ.P., grounds (1), (4) and (6),[1] from the provision of the judgment herein signed on November 30, 1972, and entered on December 4, 1972, which barred forever the prosecution against the defendants in the class actions or anyone else of any and all settled claims by any member of either or both of the M.D.L. 55 classes, established by the order of September 21, 1972, herein, except by those who filed timely requests to be excluded from the classes. That judgment was entered after a hearing on approval

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*Of the District of Maryland, sitting by designation.

1. "Rule 60. *Relief From Judgment Or Order*

"* * *

"(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (4) the judgment is void; * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

of the settlement of the M.D.L. 55 class actions. See Opinion No. 2 herein, 58 F.R.D. 19, at 32-35 (1972).

Ohio had filed three actions in March 1972 against various persons, firms and corporations (including several persons who were defendants in the M.D.L. class actions) based upon alleged violations of its common law rights, various Ohio statutes, the Federal Securities Act of 1933 and the Federal Securities Exchange Act of 1934, arising out of loans in the total amount of $4,000,000 made by Ohio to Four Seasons Nursing Centers of America, evidenced by promissory notes of that corporation. Ohio was a member of the classes established by the order of this court dated September 21, 1972, because it was the holder of securities, as defined in the Federal Securities Laws, or of commercial paper, or both. See Opinion No. 2, 58 F.R.D. at 32. Although Ohio received notice of the settlement of the M.D.L. 55 class actions, it did not opt out.

Ohio's interrelated arguments as to why it should be relieved from the judgment are based upon claimed mistake of fact, inadvertence, surprise and/or excusable neglect, the alleged merit of its claims, the equities, the asserted lack of prejudice to defendants, and Ohio's contention that it was not adequately represented by any of the class plaintiffs.

Facts

The court adopts as part of this opinion the contents of Opinion No. 2 herein, 58 F.R.D. 19, which contains a history of the Four Seasons companies, of the Chapter X proceedings involving those companies, and of the M.D.L. 55 suits, including a summary of the settlement, the hearing on confirmation of the settlement, and the subsequent proceedings, as well as a full discussion of the reasons for approval and confirmation of the settlement.

The Ohio Loans

The facts with respect to the loans are set out in State of Ohio v. Four Seasons Nursing Centers of America, 465 F.2d 25, at 26, 27 (10 Cir. 1972), as follows:

> "In early 1970, Mr. Jack L. Clark, the president of Four Seasons, received information that a Mr. Ronald R. Howard of Los Angeles, California, was in a position to assist Four Seasons in borrowing needed funds for continued operation and expansion. Howard and Clark conferred in Oklahoma City for the purpose of consummating an agreement for the procurement of funds. It was anticipated that Four Seasons would borrow between $20,000,000 and $24,000,000 from the State of Ohio. Howard contacted Crofters, Inc., a Columbus, Ohio, investment firm. Mr. Harry A. Groban, the executive vice president of Crofters, requested a credit rating on Four Seasons from the National Credit Office, a division of Dun and Bradstreet. An employee of the National Credit Office procured the latest annual report of Four Seasons, as well as other statements and bank information concerning that corporation from Mr. John Mee, a vice president of and attorney for Four Seasons. Based on this material, the National Credit Office gave Four Seasons a rating of 'prime' for commercial paper. This information was communicated by letter to Groban; Groban in turn furnished the information to Mr. Robert F. Gardner, Deputy Treasurer of the State of Ohio.
>
> "Groban advised Mee that funds would be available to Four Seasons from the State of Ohio. Thereafter, Mr. Alex Russell, an officer of Four Seasons, went to Columbus, Ohio, to secure the funds. On March 9, 1970, Russell consummated a loan of

$3,000,000 for Four Seasons with the State of Ohio through Gardner and in the presence of Groban. The loan was evidenced by two promissory notes of Four Seasons, one for $2,000,000 payable in 120 days and another for $1,000,000 due in two years. The $2,000,000 note was made on the basis of 120 days with the understanding that when due the note would be renewed for a period of two years. A second loan for $1,000,000 was advanced on March 23, 1970; a note for $1,000,000 payable in two years to the State of Ohio was executed on that date."

Chapter X Proceedings

Ohio sought reclamation of these funds as against the Trustee in the Chapter X reorganization proceedings of the Four Seasons companies. Ohio argued, inter alia, that Four Seasons had intentionally made material and fraudulent misrepresentations concerning its financial condition to National Credit Office (NCO) to obtain a rating of prime, and that the loans of $4,000,000 had been made by Ohio in reliance on that rating. Ohio also argued that the loans were in violation of an Ohio statute and therefore void.

Judge Bohanon denied the reclamation petition. He said, inter alia:

"There is no intimation in this record that Four Seasons defrauded the State of Ohio or made any misrepresentations to the State of Ohio, but at all times dealt above board and submitted all information requested and withheld nothing. Mr. Gardner made no reliance upon any alleged fraudulent document or statement made by the debtor corporation, its officers or agents, and no fraud here exists, and no misrepre-

sentations were made to the State of Ohio, or others." *In re Four Seasons Nursing Centers of America, Inc.*, 329 F.Supp. 647, 651-652 (W.D.Okla., 1971).

On appeal, in addition to points based on Ohio law, which Judge Bohanon and the Tenth Circuit found inapplicable, Ohio argued "that the prime rating relied on by the Ohio Treasurer was obtained through Four Seasons' materially false statements" and that Ohio was "alternatively entitled to the return of all funds traceable under traditional tracing rules". The Tenth Circuit stated: "We view the narrow issue presented in this appeal to be whether the State of Ohio may properly argue the application of a constructive trust to the funds in question." 465 F.2d at 27.

After deciding that Oklahoma law controlled that issue, the Court said:

> "We likewise reject appellant's argument that the prime rating relied upon by the Ohio State Treasurer in making these loans was obtained through Four Seasons' materially false statements concerning its financial status. The trial court found no fraud or misrepresentation after an evaluation of the testimony presented before it in a full hearing. We hold this decision to be adequately supported by the record; there is no cogent reason to reverse the trial court on this point. Accordingly, we affirm the finding of no fraud or misrepresentation in obtaining the rating of prime from the National Credit Office.
>
> "We are unconvinced by appellant's remaining arguments that a constructive trust is applicable to the funds in question. The quantum of evidence required by Oklahoma for imposition of a constructive trust is substantial. Mere preponderance of the evi-

dence is not sufficient to establish a constructive trust. Rather, it must be established by evidence which is clear, definite, unequivocal and satisfactory. The evidence must lead to but one conclusion, or leave no reasonable doubt as to the existence of the constructive trust. The evidence presented by appellant in the trial court does not rise to the quantum required by Oklahoma." 465 F.2d at 28.

The Tenth Circuit likewise found that there was no illegality surrounding the procurement of the funds, because the evidence did not prove noncompliance with the applicable Ohio statute; it affirmed the denial of relief. 465 F.2d at 28, 29.

Ohio also opposed those portions of the successive plans of reorganization of the Four Seasons companies which resulted in one-third of the stock of the reorganized corporation (Anta) going to "Class G Creditor Stockholders".[2] Ohio and the other general creditors of Four Seasons were "Class C Creditors."[3] At the hearing on November 2, 1971, on the plan of reorganization as then proposed, Judge Bohanon said:

"The Court now has before it the problem first of whether or not Equity and Four Seasons were in effect one and the same. They worked together, as a

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2. See discussion in Opinion No. 2 herein, 58 F.R.D. at 26, et seq.

3. At one time during the reorganization period, the definition of the proposed classes was such that Ohio might have been included in both Class C and Class G, but the plan as finally adopted allowed Ohio to recover only in Class C. While in Oklahoma City for the November 1971 hearing in the Chapter X proceedings, the attorneys for Ohio discussed the possibility of Ohio being in Class G with the attorneys for M.D.L. 55 plaintiffs who were pressing in the Chapter X proceedings the claims of persons who became Class G creditor stockholders in the reorganization plan which was finally approved.

joint adventure, helping one another, and helping Jack Clark and his robbers, and that is what they were—nothing short of just rob the American people."

His final oral opinion did not include this remark.

Ohio filed three appeals from orders in the Chapter X proceedings, including the order of July 17, 1972, which approved the Second Amended Plan of Reorganization (Restated). On September 22, 1972, however, Ohio entered into a settlement agreement with the Trustee in the Chapter X proceedings under which Ohio received proceeds from the sale of valuable real estate in addition to the Anta stock Ohio received as a Class C creditor in the Chapter X proceedings, and Ohio agreed to dismiss its pending appeals. A joint application to compromise controversy was filed on September 26, 1972, and approved October 12, 1972.

Another appeal from the order of July 17, 1972, by Charles O. Finley, et al., dealing with a limited aspect of the proceedings, was heard by the Tenth Circuit, which affirmed the district court, 472 F.2d 747 (1973). With respect to Class G stockholders, the Tenth Circuit said:

"The trial court's decision at bar, the effect of which was to give to the Class G group the standing of claimant-creditors, was made only after a very careful consideration of the underlying evidence. The court determined that there was merit in their contentions that they had been defrauded in the purchase of their shares so that there was a reasonable likelihood that they would have succeeded in litigation. All of this was a basis for the court's approval of the compromise settlement which resulted in their being issued shares in the reorganized company. It cannot, of course, be said that the Class G individuals did not satisfy the

definition of 'creditor' and of 'claim' under §§ 106(1) and 106(4). The definition of a 'claim' under the former provision includes all claims whether secured or unsecured, liquidated or unliquidated, fixed or contingent." 472 F.2d at 749.

The Suits Filed in Ohio

Meanwhile, in March 1972 the State of Ohio, through the office of the Attorney General filed three suits:

(1) State of Ohio v. Crofters, Inc., et al., Civil Action No. 72-81, in the United States District Court for the Southern District of Ohio, Western Division. Among the several groups of defendants in that case were Clark, Gray, Mee, Andrews and McCollum, defendants in some of the M.D.L. 55 cases. The complaint includes eleven claims:

First Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

Second Claim—§ 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; § 29(b) of the Exchange Act, 15 U.S.C. § 78cc(b).

Third Claim—§ 15(a)(1) of the Exchange Act, 15 U.S.C. §78*o*(a)(1).

Fourth Claim—§ 17(b) of the Securities Act, 15 U.S.C. § 77q(b).

Fifth Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5.

Sixth Claim—§ 15(c)(1) of the Exchange Act, 15 U.S.C. § 78*o*(c)(1), Rule 15c1-2, 17 C.F.R. § 240.15 c1-2; § 15(c)(2) of the Exchange Act, 15 U.S.C. § 78*o*(c)(2).

Seventh Claim—§ 1707.44(B)(4), § 1707.43, Ohio Revised Code.

Eighth Claim—§ 1707.44(G), § 1707.43, Ohio Revised Code.

Ninth Claim—§ 1707.14, § 1707.44(A), and § 1707.43, Ohio Revised Code.

Tenth Claim—§ 1707.41, Ohio Revised Code.

Eleventh Claim—Common Law Fraud.

Some of these statutory bases are the same as those in one or more of the M.D.L. 55 class actions; some are not.

Clark filed a counterclaim against Ohio in this case, third-party claims against Walston & Co. and Arthur Andersen & Co., and various cross claims.

(2) State of Ohio v. Herbert, et al., in the Court of Common Pleas of Franklin County, Ohio.

This is an action against the Treasurer of the State, another official, and the sureties on their bonds, alleging violation of certain Ohio statutes and of the officials' duties. All of the defendants in State of Ohio v. Crofters, Inc., et al., have been brought into that case as third-party defendants.

(3) Shaul, Director of Commerce of the State of Ohio v. Crofters, Inc., et al., in the Court of Common Pleas of Franklin County, Ohio. Clark, Gray, Mee, Andrews and McCollum are also defendants in that case, which is based on alleged violations of the Ohio Code, and seeks injunctive relief.

The S.E.C. filed an action in the Southern District of Ohio to obtain an injunction against Crofters, Inc., and various individuals and organizations, including Clark,

based upon various sales of securities in the form of corporate promissory notes, alleging violations of the Federal Securities Laws. See opinion of Judge Rubin in S.E.C. v. Crofters, Inc., 351 F. Supp. 236 (1972), granting injunctive relief.

Settlement

During the spring and summer of 1972, negotiations were in progress looking toward settlement of various claims, including those in the M.D.L. 55 actions, the action of the Trustee of the debtor estates against many of the M.D.L. 55 defendants[4] and the appeals of Ohio in the Chapter X proceedings.

Various attorneys for the State of Ohio, including the Attorney General, participated in one or more of these discussions, which were held in Oklahoma City, New York and Ohio. Those attorneys knew about the M.D.L. 55 cases, but no one had yet made an effort to have the case of State of Ohio v. Crofters, Inc., et al., in the Southern District of Ohio, transferred under 28 U.S.C. § 1407. A motion to transfer that case is now pending before the Judicial Panel on Multidistrict Litigation.

The problems involved in determining what class or classes should be established in M.D.L. 55 were the subject of repeated hearings in this proceeding. In July 1972, after prolonged hearings of the class problem, the court stated that it was willing to enter an order, hammered out by court and counsel during the conference, which would, in effect, designate five actions as class actions and conditionally, preliminarily and tentatively divide the persons for whose benefit the cases purport to be brought, solely for pretrial and discovery purposes, into two classes, subject

4. Which replaced the derivative claims theretofore made in some of the M.D.L. 55 cases.

to the right of the court to modify or withdraw such designation and division at any time prior to decision on the merits. Relevant portions of the proposed order are set out in Opinion No. 2 herein, 58 F.R.D. at 31, including notes 28 and 29. As this court noted in that opinion: "All counsel present then advised the court that they were engaged in very serious settlement negotiations, and asked the court to hold up the entry of the proposed order for a brief period, to permit them to continue their negotiations. They convinced the court that, in view of all the circumstances of this case, it would be fairer to the thousands of members of the potential classes, as well as the parties presently represented by counsel in the cases before the court, to let them know the terms of a proposed settlement before requiring them to decide whether or not to opt out." 58 F.R.D. at 31. See also note 30 on that page. The negotiations looking toward a settlement of the M.D.L. 55 claims and the claims of the Trustee against many of the same defendants continued until a settlement was reached and presented to this court on September 21, 1972.

During the last two months of those negotiations it became apparent that a settlement of the Ohio claims in the Chapter X proceedings was a prerequisite to a settlement of the M.D.L. 55 and Trustee claims, because, until the Ohio claims in the Chapter X proceedings were settled, the Second Amended Plan of Reorganization (Restated) could not be carried out. Negotiations continued between the attorneys for Ohio and the attorneys for the Trustee, at least one of which was held in New York at the same time as a meeting of the attorneys for both sides in the M.D.L. 55 cases. While in New York the attorneys for Ohio met with some of the attorneys for the defendants in M.D.L. 55, but did not meet with the attorneys for the plaintiffs therein. The attorneys for the M.D.L. 55 defendants knew that

Ohio was unwilling to settle its claims against "the Four Seasons insiders" (Clark et al.) unless Ohio received something more than had been offered to it by the Chapter X Trustee.

The attorneys for Ohio were never told that Ohio was a member of one of the classes which this court had indicated would be designated conditionally and tentatively for pretrial and discovery purposes in M.D.L. 55 if the settlement negotiations fell through. No attorney for Ohio asked about the classes in M.D.L. 55 and no other attorney volunteered the information, evidently believing that the attorneys for Ohio were aware of the situation.

The attorneys for Ohio and for the Chapter X Trustee agreed upon the terms of their settlement on September 13, 1972; Gretick, the attorney who was in active charge of the case for Ohio, went to Oklahoma City on September 19 to work out the terms of the joint application. Bailey, the attorney for the Trustee, left for Baltimore on September 20, and was present when the terms of the settlement of the M.D.L. 55 class claims and the Trustee's claims against Clark et al. were finally agreed upon and when the September 21 order of this court was signed. See 58 F.R.D. at 32 et seq. In that order the classes were defined as follows:

> "(a) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;

"(b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper."

Bailey returned to Oklahoma City that evening and on September 22 he and Gretick completed work on the joint application for approval of the Ohio claims in the Chapter X proceedings. Bailey told Gretick that the M.D.L. 55 order had been signed, and that "the case had been settled around Ohio".

The court finds that Bailey and all the M.D.L. 55 lawyers on both sides assumed that Ohio would opt out when it received the notice called for by the order of September 21. That was the reason the attorneys who prepared the settlement papers included therein the reservation of the rights of the M.D.L. 55 defendants to assert their claims and causes of action, including cross claims and claims for contribution and indemnity, which relate to or arise out of or in connection with the Ohio $4,000,000 loan and the litigation relating thereto. See n. 12, below.

The notice and the copy of the order which accompanied the notice made it quite clear that the settlement of the class actions was intended by all parties thereto to cover all claims which had been or could be asserted by or on behalf of the classes as defined in the order, arising out of or relating to any act or omission relating to the Four Seasons companies, or relating to the business, management or financial statements of any of the Four Seasons companies,

or transactions in the securities or commercial paper of any of the Four Seasons companies.

The notice of the proposed settlement provided for in this court's order of September 21, 1972, was duly published in The Wall Street Journal, as required by the order. Moreover, two copies of the order, notice and accompanying papers were mailed to Ohio, one addressed to State of Ohio, c/o Attorney General, and the other to William Brown, Attorney General. The return receipts indicate that both mailings were delivered to the office of the Attorney General, one on October 6 and one on October 10, 1972. One set found its way into Gretick's file; the other has not been accounted for.

Gretick was in Oklahoma City on October 12, 1972, in connection with the hearing on the settlement of Ohio's claims in the Chapter X proceedings. He had not read the M.D.L. 55 order of September 21 or the notice. Bailey showed him a copy of the order; Gretick "riffled" through it without reading it carefully, and asked Bailey to mail him a copy. That was not done. The most reasonable inference is that somewhere in the chain of command an underling knew that two copies of the order had already been sent to the Attorney General of Ohio and assumed that a further mailing was unnecessary.

Because of the death of his father, Gretick left the Attorney General's office two weeks later to return to his old law firm, and was busy in the meantime transferring his cases to other assistants. Ronald B. Brown was made lead counsel in the Four Seasons cases. Late in October he looked at the many papers in the files, saw the M.D.L. 55 order of September 21, read the first page and thumbed through some additional pages, but assumed that Gretick had done what was necessary, in view of the date of the order.

No election to opt out was filed by Ohio.

The failure of Ohio to opt out was not discussed at the hearing on approval of the settlement held in Oklahoma City on November 16, 17, 1972.[5]

In the judgment which was signed on November 30 and entered on December 4, 1972, the court, inter alia, (1) found that "the Trustee timely served by registered mail a copy of the Order and its exhibits, including the notice annexed thereto, upon all named plaintiffs in * * * State of Ohio v. Crofters, Inc. et al., * * * Shaul v. Crofters, Inc. et al. * * * and upon third party plaintiffs in * * * State of Ohio v. John D. Herbert, et al.", and (2) stated that "[a]ll of the findings and determinations made in the Order, whether conditional, *prima facie* or absolute, are confirmed and made absolute, unconditional and final", and Ordered, Adjudged and Decreed:

> "A. The proposed settlement is hereby finally approved and confirmed as being fair, reasonable, equitable and adequate, and the parties thereto are directed to perform all acts required by the proposed settlement in accordance with the terms of the Order and this final judgment.
>
> "B. The Plan of Distribution, including the administrative provisions thereof, is hereby approved and confirmed as being fair, reasonable, equitable and adequate.
>
> "* * *

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5. The only mention of Ohio at that hearing was when the attorney for Clark, discussing the defendants' chance of success if the cases went to trial, referred to the fact that in the hearing on Ohio's reclamation petition "the Federal District Court found that the State of Ohio, who falls within the classes here represented by the plaintiffs, had not proven that they had been defrauded, and that was affirmed by the Tenth Circuit." See also note 43 to Opinion No. 2, 58 F.R.D. at 37.

"I. Each and all of the class actions (Civil Actions Nos. 70-375, 71-349, 71-354, 71-582 and 71-353) and all settled claims are dismissed without costs, with prejudice and on the merits, as to all members of the classes, and each member of either or both of the classes is forever barred from the prosecution against the defendants in the class actions or anyone else of any and all settled claims.

"* * *

"L. Each member of the classes who claims a right to participate in the Class Settlement Fund shall be required to execute and deliver, as a part of his proof of claim, a good and sufficient release in the form contained in Exhibits D-1 and D-2 to the Order, and no proof of claim shall be allowed without a release in such form.

"* * *"

Provisions similar to Paragraphs I and L, quoted above, had been included in the order of September 21, referred to in the notice, because all the attorneys who negotiated the settlement and the attorneys who appeared at the confirmation hearing on November 16, recognized that the cases could not be settled unless the M.D.L. 55 defendants were protected against having to defend the cross claims or third-party claims which would likely be made against them or some of them in any suits brought by purchasers of Four Seasons securities against persons other than M.D.L. 55 defendants. The mere fact that a plaintiff has sued or may sue a broker or a registered representative alone or jointly with M.D.L. 55 defendants in connection with the purchase of Four Seasons securities does not remove the claims of such a plaintiff from the claims covered by the settlement. Something more must be shown, unless the plaintiff opted out. Otherwise, defendants might be

called upon to defend hundreds or even thousands of actions, and the purposes of Rule 23 would be thwarted. The settlement provided that any defendant might withdraw from and terminate the settlement if requests for exclusions from the classes were timely filed[6] by potential members having aggregate claims of $4,000,000 or more.[7]

Such right of withdrawal by a defendant had to be exercised by November 9, 1972, with certain rights of extension to December 8, 1972.

On or about December 5, 1972, after counsel for Clark had referred to the settlement during a pretrial hearing before Judge Rubin in State of Ohio v. Crofters, Inc., et al., Brown read the M.D.L. 55 order of September 21. After consultation with the Attorney General, Ohio's present independent counsel were consulted as to Ohio's involvement in M.D.L. 55. Ohio took no appeal from the judgment but, on December 21, 1972, filed its Motion to Obtain Relief from Final Judgment, and after conferences with counsel speaking for the principal defendants herein, the procedures to be followed were agreed upon and this court entered an order, set out in note 8 in the margin.[8]

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6. I. e., by November 1, 1972, the last day for filing such requests fixed by the order of September 21.

7. Calculated in accordance with the terms of the settlement agreement.

8. "Upon the motion of the State of Ohio for permission to file a conditional proof of claim, and upon assurance by Special Counsel to the Attorney General of Ohio that Ohio will not file an appeal from the judgment entered herein on December 4, 1972,

"It is Ordered this 29th day of December, 1972, that the State of Ohio be authorized to file a contingent proof of claim in the form authorized by this Court's order of September 21, 1972; that such proof of claim shall be null and void and of no effect if Ohio's motion for relief pursuant to Rule 60(b) is finally granted; and that such proof of claim shall become fully effective and unqualified if Ohio's motion pursuant to Rule 60(b) is finally denied. A copy of this order shall be attached to and become a part of the proof of claim to be filed by Ohio pursuant hereto."

Discussion

The Interrelation of Rule 60(b) and Rule 23

In this case Rule 60(b) and Rule 23 must be read and considered together. Rule 60(b), the relevant portions of which are set out in n. 1, above, is broadly worded to permit the court to avoid injustice.

Rule 23 is designed to avoid a multiplicity of lawsuits while protecting the substantive rights of plaintiffs and defendants. The notice provisions of Rule 23 (as amended effective July 1, 1966) are designed to provide due process and, at the same time, achieve finality in class litigation.[9]

[1] A claim of mistake, inadvertence, surprise or excusable neglect, a claim that the judgment is void, and any other reason alleged to justify relief under Rule 60 from the operation of the judgment, must be considered in the light of the purposes and provisions of Rule 23.

[2, 3] A too liberal application of Rule 60(b) in class actions would undermine the finality of judgments entered therein and would discourage settlement of such actions. Defendants will be loath to offer substantial sums of money

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9. Rule 23(c)(2) provides:

"(2) In any class action maintained under subdivision (b)(3) the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Rule 23(e) provides:

"(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

in compromise settlement of class actions unless they can rely on the notice provisions of Rule 23 to bind class members. Courts favor the settlement of controversies; fair compromise settlements are particularly important in complex, multi-party litigation which is likely to require many months of court time over a period of years.

60(b)(1)—Mistake, Inadvertence or Surprise

[4] In this case two individual notices were delivered to and received by the office of the Attorney General of Ohio, one on October 6 and one on October 10, 1972.[10] No action pursuant to the notice and order was taken by any one on behalf of Ohio until after December 8, 1972. If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent.

There was no mistake on the part of Ohio which would warrant relief on that ground in this case under Rule 60(b). Nor was there any surprise or inadvertence, as those terms are used in that Rule.

If mere failure to read a notice sent under Rule 23 were held to constitute either mistake, inadvertence or surprise sufficient to obtain relief under Rule 60(b), few judgments in large class actions would be free from successful attack, and settlement of such cases would be seriously discouraged.[11]

Ohio must prevail in this case, if at all, on one or more of its other claims.

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10. Notice was also duly published in The Wall Street Journal, in accordance with the order of September 21.

11. The court does not imply that published notice may not be sufficient in appropriate cases. Under the facts of this case, both Rule 23 and the order required that individual notice be sent to the State of Ohio.

60(b)(1)—Excusable Neglect

[5] The attorneys for Ohio were negligent in not reading the notice and order which was sent to them. The question is, whether such neglect was excusable under all the circumstances.

The fact that Ohio had one or more independent suits pending against some of the M.D.L. 55 defendants does not entitle Ohio to relief from the judgment. Nor does the breakdown of internal procedures in the office of the Attorney General. This court agrees with and adopts the reasoning of Judge Metzner in *Supermarkets General Corp. v. Grinnell Corp.*, (S.D.N.Y.1973), reported in 59 F.R.D. 512.

If Ohio's attorneys had read the notice and order, Ohio would have opted out. The attorneys for plaintiffs and the attorneys for defendants who negotiated the settlement expected Ohio to opt out. The provision in the order of September 21 preserving defendants' claims against Ohio[12] was included with the assumption that Ohio would opt out; indeed, Clark has stated that he will dismiss his claims against Ohio if Ohio's attack on the judgment herein fails.

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12. That provision of the order was as follows:

"19. The consenting defendants expressly reserve all rights, claims and causes of action, including cross-claims and claims for contribution and indemnity, if any, which they may have against any persons whomsoever, including any other consenting defendants (other than the debtor estates in the reorganization proceedings, the Trustee, their attorneys, past or present, and the resulting reorganized company and its subsidiaries and affiliates) which relate to, or arise out of or in connection with, the State of Ohio's loan of $4,000,000 to America, any act or omission with respect to such loan, the litigation relating thereto, and claims, cross-claims and third-party claims asserted in State of Ohio v. Crofters, Incorporated, et al., Civ.-72-81 (United States District Court for the Southern District of Ohio), Shaul v. Crofters, Incorporated, et al., 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas), and State of Ohio v. John D. Herbert, et al., 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas). * * *"

These facts, alone, would not justify a decision in Ohio's favor on its motion. But they help support a finding, which this court makes upon all the evidence, that although Ohio's attorneys knew of the M.D.L. 55 class actions, they conducted their negotiations with the attorney for the Trustee, participated to some extent in the September 7 meeting with attorneys for the M.D.L. 55 defendants and prosecuted their suits in Ohio against various defendants, including some of the M.D.L. 55 defendants, in the belief that Ohio would not be included in the M.D.L. 55 classes. The attorneys for the M.D.L. 55 defendants and the attorney for the Chapter X Trustee did nothing to dispel this belief of Ohio's attorneys. This court does not criticize the attorneys for the M.D.L. defendants or for the Trustee, and does not find that they made any misrepresentation or deliberately misled Ohio's attorneys. But the course of the dealings during the period from July 20, 1972 (when this court indicated the classes which it would establish for discovery and pretrial purposes if the cases were not settled),[13] through September 22, 1972 (when the joint application for the settlement of Ohio's claim in the Chapter X proceedings was completed), lulled Ohio's attorneys into the belief that the statement made to them "that the case had been settled around Ohio" meant that Ohio was not involved in the M.D.L. 55 settlement. On October 12, 1972, Gretick, the Ohio attorney in charge of the case, saw the M.D.L. 55 order of September 21 in Bailey's office, "riffled" through it and asked Bailey to send him a copy, which was not sent. But the evidence does not show that Gretick read enough to learn that Ohio was intended to be included in the M.D.L. 55 settlement, or that Bailey told Gretick that Ohio was included.[14]

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13. See Opinion No. 2, 58 F.R.D. at 30, 31.

14. Again, the court implies no criticism of Bailey.

The facts just recited *explain*, although they do not *excuse*, the neglect of Gretick and Brown to read the notice and order or the neglect of the attorneys for Ohio to cause Ohio to opt out.

60 (b) (4)—Ohio's Contention That the Judgment was Void As To Ohio

Apart from any constitutional requirement of due process, Rule 23 requires that in all class actions:

(a) (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class";

(a) (4) "the representative parties will fairly and adequately protect the interests of the class"; and

(c) (2) in any class action maintained under (b) (3), which includes the M.D.L. 55 class actions, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Subsection (e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

If these requirements are met, the requirements of the Due Process Clause are satisfied.

Notice

The evidence shows and the court finds that the required notice was given.[15] The evidence further shows that two copies of the notice were actually received by Ohio.

[6] But where a party has not appeared, although he has received due notice, the judgment will not be binding upon him unless he has had representation which meets the tests of Rule 23(a)(3) and (4), quoted above. Adequacy of representation cannot take the place of notice; nor can notice take the place of adequacy of representation.

Adequacy of Representation

In the order of September 21, 1972, the court found and determined, for the purpose of effectuating the proposed settlement and subject to the effectuation thereof, that with respect to each of the two classes established by that order the requirements of Rule 23(a)(3) and (4), quoted above, were met, as well as the other applicable requirements of Rule 23. Following the hearing on November 16, at which an attack was made on the adequacy of representation in connection with the settlement, this court, for the reasons stated in Opinion No. 2 herein, 58 F.R.D. at 40, 41, entered a judgment on December 4, 1972, which confirmed those findings.

The evidence offered by Ohio and the M.D.L. 55 defendants in support of and in opposition to Ohio's pending motion, together with the record of the proceedings in

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15. The notice called for by 23(c)(2) and the notice called for by 23(e) were combined in one notice, for reasons explained in Opinion No. 2, 58 F.R.D. at 31. The court determined after the hearing on November 16, 1972, that adequate notice had been given, and adheres to that determination.

M.D.L. 55, summarized in Opinion No. 2, 58 F.R.D. 27 et seq., show that the findings were justified with respect to almost all claims of purchasers of Four Seasons securities.

Whether they were justified with respect to the claims asserted by Ohio requires a consideration of two points raised by its attorneys: (1) that several features distinguish Ohio's claims from the claims of all other class members, and (2) that the class representatives could not and did not fairly and adequately protect the interests of Ohio. Those contentions must be considered separately and together, along with all the facts bearing on Ohio's position.

Rule 23(a)(3)—Distinctive Features of Ohio's Claims —The Typicality Point

Ohio was a member of one of the classes described in paragraph 5(a) of the order, quoted above, because the promissory notes of Four Seasons Nursing Centers of America which it acquired were securities within the meaning of the Federal Securities Act of 1933 and the Securities Exchange Act of 1934. Ohio does not deny that the notes were securities within the meaning of those statutes; indeed most of its claims in State of Ohio v. Crofters, Inc., et al., in the Southern District of Ohio, are based upon its allegation that the notes were securities within the meaning of those statutes.

Most if not all of the claims asserted by Ohio in State of Ohio v. Crofters, Inc., et al., in which Clark, Gray, Mee, Andrews and McCollum were among the defendants, are essentially similar to the claims of the M.D.L. 55 class representatives. The fact that some of the claims were asserted under the securities laws of the State of Ohio or the common law, rather than under the federal statutes, is

not sufficient to distinguish those claims from the class claims in M.D.L. 55.[16]

The claims asserted by Ohio in its state court suit against Herbert, the State Treasurer, Gardner, an employee in the office of the Treasurer, and the sureties on their bonds, are not essentially similar to the claims of the M.D.L. class representatives.[17] On the other hand, the third-party claims asserted against Clark, et al., by the defendants in that case are essentially similar to the claims of the M.D.L. 55 class representatives.

Ohio relies upon several features of its claims to support its contention that the requirements of Rule 23(a)(3) have not been met.

Before discussing those features, it should be noted that Rule 23(a)(3) requires that the claims of the representative parties be "typical" of the claims of the class, not that they be "co-extensive with" or "identical to" those of other class members. See WRIGHT & MILLER: FEDERAL PRACTICE AND PROCEDURE, CIVIL: §1764; 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2.

Ohio seeks to distinguish its claims on several grounds. It argues:

(1) That it made three loans to Four Seasons in March 1970 which were evidenced by promissory notes bearing interest at 9½% per annum and maturing essen-

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16. The allegations of plaintiff in the case of Shaul v. Crofters, Inc., et al., in an Ohio state court, are generally similar to the claims in State of Ohio v. Crofters, Inc., et al., but the relief sought is injunctive. In S.E.C. v. Crofters, Inc., et al., the relief sought was also injunctive. See opinion of Judge Rubin therein, 351 F.Supp. 236 (S.D.Ohio 1972).

17. See discussion of the loans to Four Seasons made by Ohio contained in the opinion of Judge Rubin in S.E.C. v. Crofters, Inc., Clark et al., 351 F.Supp. at 249 et seq.

tially in two years; (a) that Ohio bargained for interest return alone and not for any present or prospective equity position in Four Seasons; (b) that Ohio's sole concern was in short-term liquidity, not long-range growth; and (c) that accrued interest upon Ohio's loans amounted to $1,068,672.92 on January 2, 1973.

(2) That its loans were privately negotiated through a finder-broker; (a) that the loans required no registration statement, prospectus, other reporting, or professional underwriting group; (b) that the Ohio statute purportedly authorizing the loans required that the "commercial paper notes" be "rated prime by" NCO, a division of Dun & Bradstreet, before Ohio could invest therein; (c) that the requisite approval of NCO was obtained by the finder-broker with the cooperation of Four Seasons and exhibited to Ohio; and (d) that Ohio relied not only on Four Seasons' financial statements dated June 30, 1969, and December 31, 1969, but also on the prime rating given by NCO.

(3) That the promissory notes given to Ohio by Four Seasons were represented to be commercial paper.

[7] As we have seen, the requirement of Rule 23(a)(3) is that the claim of the representative parties be "typical" of the claims of the class, and that Rule 23(a)(3) does not require that the claims of the class representatives be "co-extensive with" or "identical to" those of other class members. The requirement of typicality may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class. WRIGHT & MILLER, op. cit., § 1764, p. 613.

Each member purchased his security or securities in a separate transaction from those of the other class mem-

bers, and the fact patterns necessarily varied. See discussion of "Classes and Subclasses" in Opinion No. 2 herein, 58 F.R.D. at 38 et seq. The members of the classes bought their securities through various brokers and registered representatives of Walston and others, during one of the public offerings or in the after-market, or in one of the private placements. All relied on alleged misrepresentations embraced in the general conspiracy theory advanced by class representatives and covered by the alleged violations of the securities laws. All of the asserted claims gave rise to potential cross-claims and third-party claims and other problems which made class action treatment and settlement of the cases desirable from the point of view of the plaintiffs, the potential plaintiffs (members of the classes), the defendants and the public.

After considering all of the evidence and arguments, the court concludes that the claims of the class members were typical of the claims of Ohio asserted in State of Ohio v. Crofters, Inc., et al., and in the third-party complaints against Clark and others in State of Ohio v. Herbert, et al., but were not typical of the claims asserted by Ohio in its complaint against Herbert, Gardner and their sureties.

Rule 23(a)(4)—Adequacy of Protection by Class Representatives

In support of its contention under Rule 23(a)(4) that the class representatives and their counsel did not fairly and adequately protect its claims, Ohio advances the same distinctions between its claims and the claims of the class representatives which it advanced in support of its argument under (a)(3).

Those distinctions do not, standing alone, show a lack of adequate representation and protection—again, with the

exception of the claims against Herbert, Gardner and their sureties.[18] But the distinctions referred to must be considered in connection with the terms of the settlement embodied in the order of September 21 and the subsequent judgment, and the events which preceded and followed the order of September 21.

The terms of the settlement which have the most important bearing on the issue under consideration are: (1) the provision that claims of class members who had been Class C Creditors in the Chapter X proceedings should be reduced to 10% of the face amount of the securities on which their claim is based; and (2) the provision which reserved the rights of the M.D.L. 55 defendants against Ohio. See n. 12, above.

(1) After hearing all of the evidence and arguments on the Ohio motion, the court adheres to the finding and conclusion that the Plan of Distribution, including the 90% reduction in the claims of those who had been Class C Creditors was fair and reasonable under all the circumstances. It was not objected to by any of the persons whose claims were so reduced, and a large percentage of the class members who had been Class C Creditors in the Chapter X proceedings have filed claims and releases herein pursuant to the settlement. It is true, however, that none of the class representatives had been a Class C Creditor in the Chapter X proceedings, and there is some force in Ohio's argument that the class representatives and their attorneys could

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18. Wright & Miller, op. cit., state in § 1769: "Courts often have stated that the interests of the representatives must be coextensive with those of the class in order to satisfy Rule 23(a)(4). This does not mean that their positions have to be identical; rather, what seems to be intended by these judicial statements is that the representatives and the class members should share common objectives and legal or factual positions."

not adequately represent it in the settlement.[19] It is not necessary, however, to decide this point alone, because it must be considered along with the other provisions in the order dealing with the Ohio cases set out in n. 12, above, and the negotiations and conversations of the attorneys for Ohio with the attorneys for the Trustee in the Chapter X proceedings and with the attorneys for some or all of the defendants in M.D.L. 55.

The court does not suggest that the Trustee and his attorney or any of the M.D.L. 55 attorneys acted unfairly or in bad faith with respect to Ohio. The court does not agree with the argument advanced by Ohio that the different positions taken by Ohio and the attorneys for the Class G defendants on several matters in the Chapter X proceedings created such an animosity or conflict as would, standing alone, prevent the class representatives in M.D.L. 55 from fairly and adequately protecting the interests of Ohio.

There is, however, the provision in the settlement preserving the claims of the M.D.L. defendants with respect to the Ohio transactions. See n. 12 above. As this court has found, those provisions were included with the expectation on the part of everyone that Ohio would opt out. Viewed in the light of Ohio's failure to opt out, those provisions cannot be justified. Indeed, Clark has offered to release his claims if Ohio's pending motion to be relieved from the judgment herein does not prevail. But the matter is not so simple; many claims, counterclaims, cross-claims and third-party claims, actual and potential, are involved.

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19. The situation is different from what it would have been if the class actions had proceeded through further pretrial to a possible trial or trials. Here we have not only a settlement, but a settlement which included special provisions with respect to the Ohio claims.

[8] When the differences between the claims of Ohio and other class members and the provisions of the order and judgment dealing specifically with the Ohio and Ohio-related claims are considered together, Ohio has made a strong case that the judgment should be held void as to all the claims of Ohio.

Rule 60(b)(6)—Other Reasons Justifying Relief from the Operation of the Judgment

To the considerations referred to in the last preceding paragraph must be added the lulling effect of the dealings which the attorneys for Ohio had with the attorney for the Chapter X Trustee and the attorneys for some of the M.D.L. 55 defendants, discussed under the heading "60(b)(1)—Excusable Neglect", above.

The court concludes that the totality of the evidence requires that Ohio be relieved from the operation of the judgment.[20]

Ohio should be added to the list included in Exhibit A, referred to in paragraph H of the judgment entered herein on December 4, 1972, and will be bound by the provisions of said paragraph H.

Counsel should agree upon a proper order within 15 days.

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20. This court intimates no opinion with respect to the possible res adjudicata or collateral estoppel effect of any prior decision in the Chapter X proceedings or elsewhere.

SUPPLEMENTING OPINION OF THE DISTRICT COURT DESIGNATED "OPINION NO. 4A"

(Dated July 25, 1973)

M.D.L. Docket No. 55

UNITED STATES DISTRICT COURT
For the Western District of Oklahoma

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

MOTION OF OHIO FOR RELIEF FROM JUDGMENT

THOMSEN, *District Judge**

The Court finds that no attorney or other representative of Arthur Andersen & Co. was present at the meeting in New York referred to on page 12 of Opinion No. 4. However, the chief attorney for Walston & Co., Inc., who was present at the meeting with counsel for Ohio on September 8, 1972, was acting as the defense counsel primarily involved in negotiating the settlement and acted as informal liaison counsel for the defendants in communications with the Court respecting the settlement of the M.D.L. 55 cases.

The attorneys for Arthur Andersen & Co. were parties to the negotiations which led to the inclusion of paragraph 19 in the order of September 21, 1972, and this Court finds that under all the facts and circumstances and the inferences which may reasonably be drawn therefrom, Arthur Andersen & Co. should be held to have participated in the unintentional and non-deliberate "lulling" which (1)

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*Of the District of Maryland, sitting by designation.

this Court found in its Opinion No. 4 to "explain", but not to "excuse" the neglect of Ohio's attorneys, and which (2) coupled with the strong case made by Ohio that the judgment entered herein on November 30, 1972, should be held void under Rule 60(b)(4) as to all the claims of Ohio, required that Ohio be relieved from the operation of the judgment under Rule 60(b)(6).

/s/ ROSZEL C. THOMSEN
United States District Judge

JUDGMENT OF THE DISTRICT COURT

(Dated August 17, 1973)

M.D.L. Docket No. 55

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

This cause came on to be heard upon the motion filed by the State of Ohio pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, grounds (1), (4) and (6) thereof, to obtain relief from the final judgment herein signed on November 30, 1972, and entered on December 4, 1972.

Upon consideration of such motion, together with the evidence offered in connection therewith, the oral arguments of counsel and their written briefs, and for the reasons stated in Opinion No. 4 herein, as supplemented by Opinion No. 4A, the Court concludes that such motion

should be overruled as to ground (1) of Rule 60(b), but that such motion should be granted upon ground (6) of Rule 60(b). This decision makes it unnecessary for the Court to decide whether relief should be granted under ground (4) of Rule 60(b), but the Court adheres to what is stated in Opinion No. 4 with respect thereto.

It is therefore ordered, adjudged and decreed that the motion of the State of Ohio to obtain relief from the final judgment herein signed November 30, 1972, and entered December 4, 1972, be, and it is hereby granted upon ground (6) of Rule 60(b) of the Federal Rules of Civil Procedure and that the State of Ohio be, and it hereby is, relieved from the operation of such judgment.

It is further ordered that Ohio be added to the list included in Exhibit A referred to in paragraph H of the judgment above mentioned and that Ohio be bound by the provisions of said paragraph H.

This Court believes and intends that this judgment constitutes a final decision of this Court for the purposes of 28 U.S.C.A. 1291. The time for filing notice of appeal shall commence to run when this judgment is entered by the Clerk of the United States District Court for the Western District of Oklahoma in accordance with the terms of Rule 79(a) of the Rules of Civil Procedure.

If, however, this judgment is not appealable under § 1291, this Court is of the opinion that it is an order which involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. 1292(b) may materially advance the ultimate determination of this litigation.

Whether relief is granted under Rule 60(b)(4) or (b)(6), the Court has the discretion to "impose such terms as are just". Under neither ground is the Court required to impose costs and/or attorneys' fees or expenses on any party or parties.

In this case the Court concludes that under the facts set out in Opinion No. 4 herein, as supplemented by Opinion No. 4A, each party should bear its own costs, and that this Court should not require any party to pay the attorneys' fees or expenses incurred by any other party or parties.

It is further ordered that one of the terms upon which relief is granted is that Ohio shall not be entitled to include in any damages it may recover against any M.D.L. 55 defendant, the costs and/or attorneys' fees or expenses incurred by it in connection with the motion which is the subject of this judgment. Nor should any defendant or third party defendant be entitled to claim as a set-off to any recovery by Ohio against him (or it) the costs and/or attorneys' fees or expenses incurred by him (or it) in connection with the motion which is the subject of this judgment. If such a claim is made by any such defendant, the provisions of this paragraph restricting Ohio shall not apply to such defendant.

/s/ ROSZEL C. THOMSEN
Senior United States District Judge

OPINION OF THE DISTRICT COURT DESIGNATED "OPINION NO. 2"

(Dated December 18, 1972)

M.D.L. Docket No. 55
(All Cases.)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

APPROVAL AND CONFIRMATION OF SETTLEMENT

THOMSEN, *District Judge.**

This opinion sets out the reasons why the court has approved and confirmed, after notice and hearing, a settlement of the class actions filed in or transferred to this district and assigned to me for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407,[1] and of all claims which have been or could be asserted by or on behalf of the classes or any member thereof (except those who opted out) and which are specified in the notice to the members of the classes.

The actions were brought by persons who had purchased securities issued or guaranteed by Four Seasons Nursing Centers of America, Inc. (America), or Four Seasons Equity Corporation (Equity) and who claimed to have

*Of the District of Maryland, sitting by designation.

1. In re Four Seasons Securities Laws Litigation, 328 F.Supp. 221 (Jud.Pan.Mult.Lit.1971), and subsequent orders of the Panel.

sustained losses as a result thereof.[2] The defendants in the several suits include officers and directors of America, officers and directors of Equity, Walston & Co., Inc. (the managing underwriter of the public stock offerings of America and Equity), some of Walston's officers and employees, Montgomery Company (a limited partnership composed of some of Walston's officers and stockholders), Arthur Andersen & Co. (the accounting firm which prepared and certified several audit reports), and others.

The settlement also includes certain civil actions and claims filed and asserted by the Trustee appointed in the Chapter X proceeding for the reorganization of the Four Seasons companies pending in this court.[3] The settlement with respect to those claims has been approved by Judge Eubanks, after a hearing in the Chapter X proceedings.

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2. The classes were variously defined in the several complaints and in counsels' statements of position on the class issue. For the purposes of the settlement they were defined in the order and notice, summarized under the heading "Settlement", below. They comprise, generally, all persons (with certain exceptions, e.g. defendants and partners of defendants) who at any time from May 9, 1968, to July 22, 1970, purchased or acquired securities or commercial paper issued by any of the Four Seasons companies and who suffered a loss thereon or after July 22, 1970, still owned any such securities or commercial paper.

3. The Four Seasons corporations involved in the reorganization proceedings are Four Seasons Nursing Centers of America, Inc. (America), Debtor, Four Seasons Overseas, N.V. (Overseas), Embassy Construction Co., Inc. (Embassy), National Medical Supply, Inc., Four Seasons Franchise Centers, Inc. (Franchise), subsidiaries of America, and Four Seasons Equity Corporation (Equity), Debtor, and FSN Corportion (FSN), a subsidiary of Equity. Other "Four Seasons companies" referred to in the settlement papers, particularly the order and notice, include Four Seasons United, Four Seasons Investors, Four Seasons Nursing Centers of the West, Inc., Four Seasons Nursing Centers of the South, Inc., and other related or affiliated companies and partnerships. The outstanding common stocks of America and Equity were publicly held. America owned all the common stock of Overseas, Medical and Embassy, 80% of the common stock of Franchise and 30% of the common stock of FSN. Equity owned 20% of the common stock of Franchise and 70% of the common stock of FSN.

Because the actions brought by a few plaintiffs who have opted out are still pending in this multidistrict proceeding (M.D.L. 55) and because grand jury proceedings are pending in the Southern District of New York, this opinion will include in the historical statement only facts which appear to be undisputed, unless the finding is preceded by a reference to the source, e.g. "The SEC report found". All facts stated herein are found only for the purpose of ruling on the settlement. The SEC report referred to is the Advisory Report of the Securities and Exchange Commission on the Proposed Plan of Reorganization, dated March 16, 1972, which was filed in the Chapter X proceedings.[4]

Historical Statement

America, a Delaware corporation, was organized on September 11, 1967, to engage in the development, construction and management of nursing centers throughout the United States. Upon organization, it acquired the interests in twelve such enterprises owned by defendants Jack L. Clark, Amos D. Bouse,[5] and Tom J. Gray, who, since 1963, had been associated in the construction and operation of nursing centers. At the time of this acquisition, five nursing homes were in operation and two were under construction.

In exchange for their interests, which had an aggregate cost to them of $53,522 and an underlying book value

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4. The findings and conclusions contained in that report have never been adjudicated, but the recommendation of the SEC that the pending plan of reorganization be approved, with certain amendments, was adopted in the Chapter X proceedings. The SEC also stated that it had no objection to the present settlement.

5. Amos D. Bouse died in 1971. His administrators have been substituted as parties defendant in those cases in which he was sued. Both Amos D. Bouse and his administrators will be referred to herein as "Bouse".

of $500,000,[6] Clark, Bouse and Gray received 864,000 shares of America common stock. Walston & Co., Inc. (Walston), purchased 36,000 common shares for $45,000, and privately sold 100,000 shares of 6% convertible preferred stock for $1 million; half of those shares were taken by Montgomery Company (Montgomery), a partnership consisting of certain officers and stockholders of Walston. The preferred stock was converted into 300,000 shares of common prior to the second public offering of America common stock.

A vice-president of Walston (McCollum), together with Clark, Gray, Bouse and America's general counsel (Andrews), became the initial directors of America. Those persons remained the directors of America until shortly before the Chapter X proceeding, filed on June 26, 1970. Walston became the managing underwriter for America and for Equity and a co-underwriter for Overseas.

On May 9, 1968, America made its first public offering of 300,000 shares of common stock at $11 a share. About six months later, on November 26, 1968, it sold an additional 100,000 common shares at $58.50 per share. As a result of a two for one split in March 1969, the 1.6 million shares were converted into 3.2 million shares. Other non-public transactions increased the outstanding shares to 3,445,651 at the time of the Chapter X proceeding. Net proceeds to America from these offerings, after commissions, totaled $8,536,000. Included in the sales to the public were secondary offerings of 557,800 shares by the original stockholders. Net proceeds to them, after commissions, totaled $27,986,200. In both offerings, Walston acted as representative of the other underwriters.

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6. This figure is based upon the May 1968 America Prospectus. Clark, Bouse and Gray were "selling stockholders" in that offering.

The registration statement and the prospectus of the first public offering contained America's financials as of June 30, 1967, and December 31, 1967, with Andersen's certified audit report of April 15, 1968.[7] America's annual report for its fiscal year ended June 30, 1968, was delivered to America on August 21, 1968, and was released to the public in September or October. The registration statement and the prospectus of the second public offering contained America's financials as of June 30, 1968, with Andersen's audit report dated August 21, 1968, which included similar certificates to those set out in footnote 7 in the margin.

On November 12, 1968, America common stock was admitted to trading on the American Stock Exchange. It began almost immediately to rise sharply in price on heavy volume. By October 31, 1969, it had risen in price from $29.50 to $90.75 per share (adjusted for a two-for-one split).

On November 6, 1968, Equity and FSN were incorporated in Delaware. Prior to the organization of

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7. Andersen's certificate was in the usual form, namely: that their "examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances"; and that in their opinion "the accompanying consolidated balance sheet and consolidated statements of operations, retained earnings (deficit) and capital surplus present fairly the financial position of Four Seasons Nursing Centers of America, Inc. and subsidiaries as of December 31, 1967, and the results of their operations for the three years ended June 30, 1967, and the six months ended December 31, 1967, all in conformity with generally accepted accounting principles applied on a consistent basis after giving retroactive effect to the change (which we approve) in method of providing depreciation referred to in Note 6 to the consolidated financial statements."

Equity, America had tried to sell to local investors the interests in the centers it or its predecessors had built.[8]

The public financing enabled America to initiate an extensive program for the construction of nursing centers, each of which generally was separately incorporated. In most cases the nursing centers, when completed, were under America's management pursuant to long-term contracts. As indicated in the prospectus of its first public stock offering, America was then managing 14 completed centers. It had nine under construction, had contracted for seven more, and had taken preliminary steps to develop an additional twenty.

America was expected to carry the costs through construction and to find permanent mortgage and equipment financing. The SEC report states that in addition, since a nursing center was not expected to be profitable for some time after its opening, America was obliged to advance substantial sums to cover the cash deficits of these centers; much of these advances ultimately proved uncollectible.[9]

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8. The SEC report states that such stock equity normally represented about 10% to 15% of the total price, and in some instances less; the sale efforts were only partially successful; America retained 100% of the equity in one of the fourteen centers under its management, 50% in three, and 30% in two.

9. America's other corporate activities included its supply division, which performed centralized purchasing and warehousing services for the managed centers, and the management division. Shortly before the Chapter X proceedings, America organized Medical, a wholly-owned subsidiary of America, to engage in the medical supply business and to serve the centers under America's management and any other customers. The Chapter X proceedings brought this venture to an abrupt end.

Embassy was organized in 1968 to engage as contractor on behalf of America in those states in which America did not wish to undertake construction directly. The SEC report states that Embassy had virtually no capital of its own, and in its operations it incurred substantial construction liabilities for which it was to be reimbursed by America.

The SEC found that America's ambitious program and its operating and other needs required substantial cash outlays, and that to meet these requirements it was necessary for America to increase its volume of sales and profits. America's reported revenues increased from $2.2 million in the year ended June 30, 1967 to $19.3 million in the year ended June 30, 1969. Reported net income increased from $300,000 to $2.7 million for the same periods, with a corresponding spectacular increase in per share earnings.

From the very beginning profits on construction, anticipated at 50% of actual costs, or better, were almost the sole source of America's reported earnings. Construction revenues for the year ended June 30, 1968 were reported as $5.25 million, as against costs of $3.25 million, or a gross profit, before overhead, of 60% of cost.

The SEC concluded that without bona fide sales, America was not in a position under established accounting principles to record these construction profits as income.

The SEC found that Equity and FSN were organized pursuant to an agreement, dated November 4, 1968, entered into by America, Clark, Bouse and Gray, with four individuals who became the sole directors of Equity. Their principal offices were in Oklahoma City, as was America's.

Equity issued initially 120,000 shares of common stock at $11 per share. One-third of these shares were issued to Equity's four directors, the remaining two-thirds to America, Clark, Bouse and Gray. It was agreed that the latter shares were to be non-voting while held by them.

On February 27, 1969, Equity sold publicly, through Walston, 545,000 shares of its common at $11. At the same time it also sold to 14 institutional investors 135,000 shares and $714,000 principal amount of 6½% junior subordinated convertible debentures. Net proceeds to Equity from these offerings were $7.9 million, after underwriters' commissions.

Andersen had prepared a report on examination of Equity's balance sheet as of December 3, 1968, and another as of February 14, 1969. The latter statement, certified in the customary manner, was included in the Equity prospectus. Andersen also (a) prepared and delivered on July 22, 1969, their auditor's report on examination of Equity's balance sheet as of June 30, 1969, and a consolidated balance sheet and related statements for Equity and subsidiaries as of June 30, 1969, which was released to the public about September 11, 1969, and (b) prepared and delivered on September 9, 1969, a report of examination of America's consolidated balance sheet and related statements as of June 30, 1969, which was promptly released to the public.[10]

FSN was to serve as a joint subsidiary of Equity and America, Equity taking 70% and America 30% of its $1,000 capital stock. Title to completed nursing centers was to be transferred to FSN by America and Equity, from time to time, as security for 7½% first mortgage notes, maturing July 1, 1987, to be issued by FSN as part of the permanent financing of these nursing centers. These notes would be issued under an open-end indenture, all notes being secured by a blanket mortgage. The notes

10. The annual reports of America and Equity were released to the public on October 31, 1969.

would be fully guaranteed by Equity, America's guarantee to be limited to 30%.[11]

In the year and half of their joint corporate activities, about 100 projects were initiated by America and Equity. By June 26, 1970, the date of the Chapter X proceeding for America, 25 joint nursing centers were completed and in operation and at least as many under construction. In addition, 31 sites had been acquired and others were under contract with escrow deposits. These properties represented an investment of about $43 million in land, buildings and equipment.

The SEC concluded that aside from their role in supplying some of the financing, Equity and FSN contributed little to this massive venture. Its report stated that the directors of Equity and FSN acknowledged that they had no previous experience in this business, and neither Equity nor FSN attempted to develop its own staff or organization; that Equity dealt only with America, and typically each project was organized as a general partnership between them.

Under the standard partnership agreements, America was employed as general contractor to construct the facility and to supply the equipment, both at a profit, and to use its best efforts to secure the necessary financing commit-

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11. The SEC found that the preorganization agreement of November 4, 1969, was linked to mortgage commitments from the same 14 institutional investors who purchased the debentures and part of the stock of Equity; the commitments, terminating June 30, 1971, were for the purchase of not more than 19.5 million of mortgage notes. The investors agreed to buy FSN 7½% mortgage notes for 62% of the lesser of the amount determined, inter alia, by the actual cash expenditures for the completed nursing centers conveyed to FSN or the appraised value thereof. Clark, Bouse and Gray agreed to buy FSN 7½% subordinated notes for 13% of such amount. America and Equity agreed to provide the remaining 25% by the purchase of additional stock, 70% thereof by Equity and 30% by America.

ments. The SEC report stated that America was appointed "Governing Body" with exclusive authority over all aspects of center management and operation at a specified fee, and the partnership itself, meaning Equity, was expressly excluded from participating in any phase thereof; that America was also designated to prepare and keep custody of all partnership records, books and operational data; that the only matter expressly left to mutual agreement was the selection of the site, but America was designated to make the market survey to determine the feasibility of the project.

Under the partnership agreements for each facility, Equity and America were to share in the profits and losses of the partnership, 70% for Equity and 30% for America. This is the same ratio in which the contribution to capital was fixed for the two partners.[12]

The SEC found that America in its various capacities, dealt directly with creditors and suppliers in almost all phases of the operations and was initially responsible for payment of most of the costs, some land purchases being the principal exception. By far the largest expenditures were for construction, and under the construction contract with each partnership America was to receive progress payments on the contract price in five equal instalments, based on specified stages of completion. Its initial practice was to bill Equity for 70% of each earned construction instalment, which was usually remitted by Equity until it substantially exhausted its cash resources in November 1969. America billed 100% of its construction charges to the partnership center.

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12. In three instances in which outside investors were brought in, Equity's ownership was reduced accordingly. The project was either incorporated or continued as a partnership with the outside investor participating as a limited partner.

The SEC further found that the billing procedure soon broke down, due partly at least to malfunction of America's accounting system; that in preparing financial statements for the six months ended December 31, 1969, both companies found it necessary to adjust their book accounts by more than $10 million for unbilled construction; that at about this time, Equity ceased to record deficiencies in its partnership contributions; and that almost six months of intercompany liabilities were simply omitted from its books at the time the Chapter X proceedings began in June 1970. Nevertheless, construction profits continued to be the primary source of reported earnings of America until the Chapter X petition was filed. The other divisions made only a negligible contribution to earnings.

During the period from May 1968 through March 1970, Clark made many optimistic statements with respect to the projected earnings of America, which were not realized. These statements were published in various newspapers and included in market letters of broker-dealers recommending America stock.

Andersen prepared and delivered on March 22, 1970, its auditor's report on examination of Equity's balance sheet as of December 31, 1969; it was released to the public on March 30, 1970. It does not appear that a report of examination of America's balance sheet as of December 31, 1969, was ever released.

On April 29, 1970, America issued a release to the public that a loss was expected for the quarter ended March 31, 1970.[13]

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13. Clark takes the position that the loss resulted from (1) America's decision to reflect promptly a change in its "theretofore generally accepted" accounting procedures and to offset against third quarter earnings all previously recognized income from franchise fees, and (2) unanticipated cost overruns on construction sites in the Midwest coupled with possible embezzlement of company funds in the Chicago area.

The next day, April 30, the American Stock Exchange suspended trading in America stock. On May 12, 1970, the SEC ordered the first of a series of 10-day suspensions of trading.

After an investigation, the American Stock Exchange issued on March 1, 1971, a report dealing with "three possible violations" by Walston.[14] It is not necessary for this court at this time to set out or summarize the contents of the report or Walston's response, beyond stating: (a) that the report includes certain statements of fact, evidence, inferences and conclusions, which, if true and justified, would lend support to some of the claims made against Walston and other defendants by the plaintiffs in these class actions; and (b) that the reply contains certain statements of fact, evidence, inferences and conclusions, which, if true

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14. The "three possible violations" were referred to by Walston in its reply as "charges of wrongdoing" and were summarized in that reply as follows:

> "FIRST: That in and during the period December 1969 to April 1970 Walston, having confidential, non-public material information concerning [America] which was substantially adverse and unfavorable to that company engaged, by reason of such inside information, in a program of stock disposition, including acting as selling broker for certain 'insider' accounts.
>
> "SECOND: That in a period prior to January 8, 1969 when [America] announced a stock split, and in a period prior to April 7, 1969 when [America] announced a franchise program, Waltson, having confidential, non-public material information concerning that stock split and franchise program (including information secured at a meeting on January 13) engaged, by reason of such inside information, in a program of stock acquisition.
>
> "THIRD: That Walston failed to take action in compliance with admonitions of Amex."

Walston undertook to show in its response to the report that the three charges were "totally unsupported by the evidence" and were "incorrect". The charges have never been adjudicated, but were disposed of by an agreement between Walston and Amex.

and justified, would lend support to the defense against those claims.[15]

The Chapter X Proceedings

The Chapter X proceedings were filed with respect to America on June 26, 1970, with respect to Equity on July 22, 1970, and with respect to other Four Seasons corporations during July, August and October 1970. All were consolidated.

A plan of reorganziation of the corporations was prepared by the Trustee, which, with certain amendments, was considered at a hearing in November 1971. Thereafter the Trustee proposed a second amended plan. On March 17, 1972, the SEC filed its advisory report on the proposed second amended plan, approving the plan generally, but

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15. Charges were also filed by the Exchange against Frank J. Crimmins, a vice president of Walston, in charge of one of its New York offices. One of the charges was summarized by Crimmins in his reply as follows: (a) that "as a matter of law, a special relationship between Walston, Crimmins and * * * [America] * * * existed. From or because of this special relationship, it is alleged that Mr. Crimmins had an obligation to the customers of Walston, to the investing public and to the Exchange to avoid engaging in activities which could be construed as serving his own self-interest and the special interests of Walston" and (b) that "solicitation and concerted activities to promote interest and market activity in the stock of [America] engaged in by Mr. Crimmins, to the extent disclosed in the Report, coupled with his direct and/or indirect substantial position in [America] stock, tended to serve and enhance his own personal interest and the special interest of Walston and was in direct conflict with the obligation purportedly created by the alleged special relationship." Crimmins answered the charges, and they have never been adjudicated.

Again, it is not necessary for this court at this time to do more than state (a) that the report includes certain statements of fact, evidence, inferences and conclusions, which, if true and justified, would lend support to some of the claims made against Crimmins and other defendants by the plaintiffs in these class actions; and that the reply contains certain statements of fact, evidence, inferences and conclusions, which, if true and justified, would lend support to the defense against those claims.

suggesting a few modifications.[16] As a result of those suggestions, a Second Amended Plan of Reorganization (Restated) was filed on March 21, 1972, and Judge Bohanon entered (1) an order approving the restated plan, setting a date for hearing on confirmation of the plan and objections thereto, and providing for notice of the restated plan and of the hearing to be sent to creditors, stockholders and other interested parties, (2) an opinion and order approving the compromise and settlement of the Class G claims (defined in the plan, set out below herein), and (3) an order establishing procedures for filing Class G claims, approving forms, fixing a bar date, directing notice, etc. The hearing was held, objections were heard, and on July 17, 1972, Judge Bohanon entered an order confirming the Trustee's Restated Plan, hereinafter referred to as "the plan".

The plan provides for the transfer of all the assets of the debtors and of all partnerships and corporations in which they are the sole partners or shareholders, to a reorganized company (Anta).

Anta assumes the remaining mortgages and certain lease obligations, upon terms agreed upon with this group of creditors.[17]

Unsecured creditors of all the debtors, referred to as "Class C creditors", receive one share of Anta stock for each $7 principal amount of allowed claims.[18]

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16. Pursuant to Section 173 of Chapter X. 11 U.S.C. § 573.

17. It also assumes operating liabilities incurred during the proceedings.

18. Except that claimants holding unsecured claims aggregating $200 or less will be paid such amount in cash. No fractional shares will be issued, but will be paid in cash at the rate of 80% of the fractional interest in one share.

Holders of outstanding shares of America or Equity, and holders of warrants to buy shares of America, Equity or Franchise are not considered Class C creditors. The plan is based upon the conclusion that America and Equity are insolvent and that the warrants of Franchise are without value.

The plan provides for an offer of settlement to "Class G—Creditor Stockholders", defined as persons who (1) purchased stock or other securities of debtors (either directly from debtors or in the securities markets) on or before July 22, 1970 (the date of the filing of the Chapter X petition by Equity), and (2) filed claims, in a manner and within the time fixed by the court in the order approving the plan, for the amount of the loss suffered by them, the loss being defined as the excess of amounts paid by them for all such purchases, over the amounts realized by them from all sales of such securities. The plan set aside a number of shares of Anta stock equal to one-half of the number of shares issued to unsecured creditors, and will distribute such shares (i. e. one-third of all Anta stock) among the Class G claimants in proportion to the amount of losses claimed and allowed. The number of Anta shares to be distributed for each dollar of loss thus depends on the total amount of claims for losses filed and allowed.[19]

The Class G claimants, therefore, are generally the same persons who comprise the class or classes sought to be established in the class suits involved in M.D.L. 55. Class G claims in a total amount of approximately $110 million have been filed with the Trustee in the reorganization proceeding.

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19. The amount of shares to be distributed to any claimant may not exceed one share for each $7 of loss.

The Trustee retained for prosecution all causes of action belonging to the debtors.

The SEC noted in its March 16, 1972, report that the stock of Anta to be received by unsecured creditors under the plan had an estimated value of $21 million (which was about 80% of their claims, exclusive of post-bankruptcy interest), whereas the Class G claimants received stock of Anta having an estimated value of $10.5 million in settlement of claims against the debtors of a little over $100 million. Nevertheless, after a full discussion of the problems involved, the SEC concluded:

> "* * * All facts considered, we think that the trustee's offer of settlement is a practical proposal that under Chapter X standards the court may approve in the interest of a prompt reorganization and as fair to all persons affected by this settlement."[20]

Two appeals were taken from the order of the bankruptcy court approving the plan—one by Lowell S. Fink et al., plaintiffs in two of the class suits in M.D.L. 55, the other by Charles O. Finley. The appeal by Fink et al. is being dismissed as part of the M.D.L. 55 settlement.[21]

As noted at the beginning of this opinion, the settlement now under consideration includes not only the claims involved in the M.D.L. 55 class suits, but also the claims of

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20. The SEC added: "It should be noted that the settlement does not call for any release of the defendants other than the debtors. Claimants will remain as free as heretofore to pursue the class suits against such other defendants, but with one-third of the reorganized enterprise securely tucked away in their pockets."

21. The parties to the settlement agreed to proceed despite the refusal of Finley to dismiss his appeal, but made this settlement null and void if its approval by this court in M.D.L. 55 or by the judge in the Chapter X proceeding is vacated or reversed in whole or in part on appeal.

the Chapter X Trustee against many of the same defendants. After the hearing on November 16-17, 1972, in M.D.L. 55, this court stated that it would approve and confirm the settlement, and on November 21, 1972, after a hearing in the Chapter X proceeding, Judge Eubanks confirmed the settlement of the Trustee's claims.

M.D.L. 55

Ten actions—seven of which claimed to have been brought on behalf of all purchasers of stock of America or Equity or both who suffered a loss—were brought in or transferred to this district and assigned to me by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407 on May 21, 1971.[22] Nine additional cases have been similarly transferred.

Each action named a different set of defendants, but Clark, Bouse, Gray, Andrews, McCollum, Walston & Co., Inc., Montgomery Company and Arthur Andersen & Co. have been named as defendants in most of the cases which seek to be treated as class actions. Altogether 40 individuals, partnerships and corporations have been named as defendants in one or more actions, not counting the efforts to establish several defendant classes, which would add hundreds of additional defendants.

In one or more of the complaints claims were asserted against some or all of the defendants under §§ 5, 11, 12 and 17(a) of the Securities Act of 1933, under §§ 9, 10(b) and 20 of the Securities and Exchange Act of 1934, and under

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22. In re Four Seasons Securities Laws Litigation, 328 F.Supp. 221 (Jud.Pan.Mult.Lit.1971).

Rule 10(b) (5) of the SEC.[23] One or more included a common law claim and derivative claims. The derivative claims were dropped after the Trustee in the Chapter X proceedings filed actions against various defendants.

A first pretrial order,[24] dated May 28, 1971, provided for the practice and procedure in the consolidated cases, stayed discovery proceedings until further order of the court, tolled certain time requirements, including the time for filing responsive pleadings, and called for a preliminary pretrial conference on July 20, 1971.

At the July 1971 conference, counsel for the respective parties stated their positions. It was the general consensus and the court ordered that all discovery or other pretrial proceedings should be stayed until further order of the court, except specified document discovery and interrogatories. The next pretrial conference was scheduled for November 18, 1971. The permitted discovery was conducted.

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23. The claims may be summarized as follows: that—

(a) In connection with the sale of securities or commercial paper of America, Franchise, Overseas, Equity, FSN, and related or affiliated companies, the defendants employed devices, schemes, and artifices to defraud and engaged in acts, transactions or a course of business which operated as a fraud or deceit upon the purchasers of such securities or commercial paper;

(b) registration statements, prospectuses, financial statements, and other material published and made available to stockholders and the public contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, with respect to America, Francise, Overseas, Equity, FSN, and related or affiliated companies; and

(c) certain of the defendants engaged in a conspiracy to defraud investors with respect to America, Franchise, Overseas, Equity, FSN and related or affiliated companies.

24. Generally similar to Sample Pretrial Order No. 1, Manual for Complex and Multidistrict Litigation, pp. 161, 162.

At the November 1971 conference, counsel for Sher had different ideas from counsel for Fink et al. and counsel for Fetman et al. as to the desirable method of procedure. Counsel for Sher wished to proceed rapidly to trial on the theory of a single conspiracy *ab initio*; counsel for Fink wished to press separate claims or causes of action under various sections of the 1933 and 1934 acts, including claims for market manipulation, which would complicate and delay the progress of the cases, but might result in holding a larger number of defendants. Counsel for the several plaintiffs and defendants differed sharply in their views with respect to the proper class or classes. It was apparent that additional discovery and briefing would be needed before this court could fairly decide what classes should be established and for what purposes. It was generally agreed that a schedule for (a) discovery on the class issue, (b) statements of position on the class issues by all counsel, (c) replies to such statements, and (d) a hearing thereon, should be established. As tight a schedule as was reasonably possible was established by court order and enforced with few exceptions.

During the next few months the court heard arguments on the discovery of certain classes of documents, and made the necessary rulings.[25]

Meanwhile, in January 1972 counsel for three plaintiffs or groups of plaintiffs seeking to represent a class or classes were given conditional leave to file amended complaints, reserving the right to all parties to object to the proposed amendments. Several plaintiffs filed such amended complaints, some adding additional defendants, further complicating the class problem. In his amended complaint, objections to which have not yet been heard,

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25. See, e. g., ruling on the production of certain documents in the possession of the SEC, D.C., 54 F.R.D. 527.

plaintiff Sher seeks to add as a defendant class all persons who were partners of Arthur Andersen & Co. at any time during the period from May 9, 1968, to May 13, 1970. There are hundreds of such persons, in many countries. The court has not ruled on the troublesome question whether a class of defendants can be sued for damages, with service only on a representative selected by the plaintiff, nor on other questions which will arise if classes of defendants are permitted.

Because claims of attorney-client privilege had been asserted, the court ordered that limited depositions of defendants Clark and Andrews[26] be taken in open court on May 1. The court believes that these depositions helped all parties appraise the settlement value of the cases.

After the depositions a further conference was held, with respect to discovery motions and related questions, the authentication of documents, the effect of the proposed reorganization plan in the Chapter X proceedings, and other matters.

Early in May Fink was conditionally allowed to file, subject to objections, a third amended complaint. Among the parties sought to be added by Fink were four of the largest broker-dealers in the country, joined on a claim of market manipulation by them and other defendants.[27] In the titling of his third amended complaint, plaintiff Fink lists among the defendants "Arthur Anderson & Co., A Co-Partnership, Marvin Hambrick and Kenneth J. Wahrman, individually and as representatives of a Class consisting of 800 or more individual partners of Arthur Anderson &

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26. Andrews had served as counsel for several individuals and entities.

27. Also sought to be added by Fink was Francis R. Santangelo, the designated American Stock Exchange specialist on America, who was sued individually and as a partner of L. D. Babcock & Co.

Co., Walston & Co., Inc., individually and as representative of a class of underwriters who participated in the public sale and distribution of common stock of Four Seasons Nursing Centers of America, Inc., pursuant to Prospectus dated May 9, 1968 and November 26, 1968, Montgomery & Co., a limited partnership, Glenn R. Miller, individually and as representative of a Class consisting of limited partners of Montgomery & Co." In the body of the complaint, however, under the heading "defendants", Fink lists and identifies Arthur Andersen & Co., Marvin Hambrick, Kenneth J. Wahrman, Walston & Co., Inc., Montgomery Company, and Glenn R. Miller, but makes no reference to any of them as representatives of a class of defendants, and although he sometimes asserts claims against "all defendants", he does not refer in any way to a class of defendants in the body of the complaint. He asserts claims under various sections of the Securities Acts, as well as Rule 10b(5), and retains his common law claims.

During May and June counsel for many of the parties filed statements of position on the class issue, pointing up the many problems involved. There was little agreement among them with respect to the proper classes.

From June 19 through June 22 a conference was held, at which the possible and proper classes and the problems raised by the proposed addition of the four broker-dealer defendants were discussed. The court ordered that another conference be held on July 17.

That conference was held on July 17-20. Counsel for Fink was allowed to drop the four large broker-dealers from his conditionally allowed third amended complaint, without prejudice.

After further argument on the class problem, as to which counsel for the various parties took widely varying positions, the court stated that it was willing to enter an

order, hammered out by court and counsel during the conference, which would, in effect, designate five actions as class actions and conditionally, preliminarily and tentatively divide the persons for whose benefit the cases purport to be brought, solely for pretrial and discovery purposes, into two classes, set out in footnote 28 in the margin, subject to the right of the court to modify or withdraw such designation and division at any time prior to decision on the merits. The proposed order included the findings required by paragraphs (a) and (b)(3) of Rule 23, F.R.Civ.P., but added the provisions set out in footnote 29 in the margin. The

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28. "(1) All persons (other than defendants named in any of said cases, including the partners of any of said defendants) who at any time from May 9, 1968, to July 22, 1970, inclusive, purchased or acquired securities issued by Four Seasons Nursing Centers of America, Inc., Four Seasons Franchise Centers, Inc., or Four Seasons Overseas, N.V., and who suffered a loss thereon or still owned any such securities after July 22, 1970;

"(2) All persons (other than defendants named in any of said cases, including the partners of any of said defendants) who at any time from November 6, 1968, to July 22, 1970, inclusive, purchased or acquired securities issued by Four Seasons Equity Corporation, and who suffered a loss thereon or still owned any such securities after July 22, 1970."

29. "This Court reserves and defers a determination of the specific cases, claims or questions of law or fact which qualify for class action treatment under Rule 23 for purposes other than discovery.

"This order is entered without prejudice to the rights of the parties to renew or otherwise assert, in connection with any reformulation of class definitions, the creation of new classes or of subclasses, the finalization of classes for purposes of trial or otherwise, any and all objections, claims or contentions they may have with respect to the issues of class definition and class representation in these proceedings. This order is also entered without any determination of, and with full reservation to the parties of the right to press or resist all applications, motions or objections hereafter filed or presently pending, including, inter alia, those relating to: (a) whether as to any claim, complaint or cause of action a valid claim is stated; (b) whether any valid defense of the Statute of Limitations is available; (c) whether any complaint may be amended or new parties added to pending complaints; (d) whether any class of defendants may be approved for class action treatment pursuant to Rule 23; (e) whether any approval for class action treatment pursuant to Rule 23 may be approved or authorized as respects recently named new defendants, including Frank Crimmins, Francis R. Santangelo, and L. D. Babcock & Co."

proposed order also contained provisions for notice to all members of the classes, advising them of their right to opt out and other necessary matters. See Rule 23(c)(2).

All counsel present then advised the court that they were engaged in very serious settlement negotiations, and asked the court to hold up the entry of the proposed order for a brief period, to permit them to continue their negotiations. They convinced the court that, in view of all the circumstances of this case, it would be fairer to the thousands of members of the potential classes, as well as the parties presently represented by counsel in the cases before the court, to let them know the terms of a proposed settlement before requiring them to decide whether or not to opt out.[30]

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30. Wright and Miller, in their Federal Practice and Procedure: Civil, § 1786, at p. 145, state:

"Rule 23(c)(2) does not specify when the required notice should be given. Generally, however, it should be sent as soon as the court determines that a class action is proper under subdivision (c)(1) so as to provide the absentees with a full and meaningful opportunity to intervene to protect their rights or to opt-out. Although the timing of the notice has little or no practical effect on the class members' ability to exclude themselves from the action, inasmuch as that is preserved until the date specified in the notice, the right to enter the action may be substantially impaired if the absent parties are not notified of the suit's existence until shortly before a judgment is entered.

"In some cases the court may decide to postpone giving formal notice under Rules 23(c)(2) if there is reason for the delay and it would not prejudice those class members who are not before the court. * * *"

In this case the court has never felt that it was or is possible, without considerable additional discovery and argument on many issues, to determine what, *if any*, class or classes may properly be established for a trial or trials. The parties were in general agreement that the cases had not yet reached a point where defendants should be required to file their answers or other responsive pleadings, because it was felt that arguments on questions raised by pleadings at this stage of discovery would be premature. The discovery which has heretofore been conducted was for a limited purpose, and could properly be conducted without establishing classes. The further discovery—principally depositions

(Continued on following page)

The Settlement

During most of the next two months counsel for the several parties engaged in long and difficult settlement negotiations, which finally resulted in an agreement, which was embodied in an order, notice and accompanying documents. The order, conditionally approving the proposed settlement for submission to the members of the classes established by the order for the purpose of effectuating the proposed settlement, and the notice attached to the order as an exhibit, were signed by the court on September 21, 1972, after a hearing. The classes so established by the order were:

1. All persons (other than the Four Seasons companies, the Trustee thereto, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970, still owned any such securities or commercial paper;

2. All persons (with the same exceptions) who at any time from November 6, 1968, to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970, still owned any such securities or commercial paper.

Footnote Continued—

of many witnesses, which would be taken were it not for the settlement—would require the establishment of tentative classes for limited purposes. The court was prepared in July 1972 to establish such tentative classes and to notify potential class members of that action. However, since a settlement was imminent, it would have been unfair to the class members to require them to decide whether or not to opt out without telling them about the proposed settlement.

The court found and determined that for the purpose of effectuating the proposed settlement, the pre-requisites set out in Rule 23(a) and (b)(3) were met with respect to each of the two classes established by the order.

James R. Tolbert, III, the Trustee of America, Franchise, Overseas, Equity, and FSN, was authorized and directed to mail, on or before October 2, 1972, notice and proof of claim forms[31] to each member of the classes whose identity and address was known to him or whose name was furnished to him by any of the parties, at such member's last known address, and to cause the notice to be published once, on or before October 6, 1972, in the national edition of The Wall Street Journal.

Pursuant to Rule 23(c)(2), F.R.Civ.P., the court found that the notice to be given to members of the classes as directed by the order was the best notice practicable under the circumstances, that adequate provision had been made for individual notice to all members of the classes who could be identified through reasonable effort, and that such notice met all requirements of Rule 23.

The settlement may be summarized as follows:

(a) For purposes of effectuating the settlement, the Fetman, Fink (2 cases), Ginsberg and Sher actions shall be maintained by the plaintiffs therein as class actions on behalf of the classes listed above.

(b) The settlement includes all claims which have been or could be asserted by or on behalf of the classes, or any member thereof, arising out of or relating to any act or omission relating to the Four Seasons companies, and other related or affiliated companies, or relating to the business,

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31. In substantially the same form as Exhibits C, D-1 and D-2 to the order.

management or financial statements of any of the Four Seasons companies, or transactions in the securities or commercial paper of any of the Four Seasons companies, prior to the date of entry of the final judgment provided for in the order, whether or not asserted in the class actions.[32]

(c) The settlement of the class actions is made in conjunction with and contingent upon the settlement of four plenary actions instituted in this court by the Trustee in the Chapter X proceedings.

(d) In settlement of the class actions and the Trustee actions, certain of the defendants or persons on their behalf have severally agreed, subject to the terms and conditions of the order, to contribute various amounts towards the settlement aggregating $8.5 million in cash (the Settlement Fund) and to release or procure the release of certain claims aggregating in excess of $1 million heretofore filed against the debtor estates in the Chapter X proceedings. Walston has also agreed to release and discharge such outstanding debt balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston, but only so far and to the extent that such debt exists by reason of the purchase by such customer, from or through Walston, of securities of America or Equity.[33] Of the $8.5 million, the amount of $7 million (the Class Settlement Fund) is to be paid in settlement of the class actions, and $1.5 million is to be paid to the trustee, together with the release of the claims

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32. The order and notice then summarized the claims which have been asserted in the class actions. See footnote 23.

33. On September 21, 1972, this amount was believed to be about $385,000. The court is now advised that it will probably be about $500,000.

against the debtor estates referred to above, in settlement of the trustee actions.[34]

(e) The Plan of Distribution of the Class Settlement Fund, set out in the notice, contemplates that:

"(a) Distributions will be made to claimants whose claims are allowed by the Court, in the proportion that the allowed claim bears to the aggregate of all allowed claims.

"(b) Any Class 'G' claim heretofore filed in the reorganization proceedings by any member of the classes may, if the claimant so elects, be incorporated by reference in these proceedings;

"(c) Each claimant will be required to offset, against his losses on purchases from May 9, 1968 through July 22, 1970 of securities or commercial paper of America, Franchise, Overseas, Equity and FSN, any profits realized thereon;

"(d) Any Class C creditor in the reorganization proceedings whose claim is based upon debentures, notes or other debt-type securities of America, Franchise, Overseas, Equity, or FSN shall be deemed to have received a dividend on his claim equal to 90% of the face amount of such debt securities by virtue of the provisions in the Plan of Reorganization for distribution of stock of the reorganized companies;

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34. The Trustee advised the court that the proposed settlement will materially expedite the termination of the Chapter X proceedings and will enhance the value of shares of the reorganized company to be distributed pursuant to the plan of reorganization heretofore approved by the court in the Chapter X proceedings.

"(e) All equity securities heretofore issued by America, Franchise, Overseas, Equity or FSN shall be deemed to have no value; and

"(f) No claim for interest shall be allowed."

The claim of the Class G creditors in the Chapter X proceeding had also required netting.

The notice contains the requirement that proof of claim forms be filed by January 3, 1973.

(6) Upon final approval of the settlement, the judgment to be entered in M.D.L. 55 will:

(1) Dismiss without costs, with prejudice and on the merits: each and all of these class actions and all settled claims as to all members of the classes who have not duly and timely requested exclusion therefrom; all other actions in M.D.L. 55 brought by consenting plaintiffs and by any other plaintiff who is a member of either of the classes and has not duly and timely requested exclusion therefrom (opted out); and the derivative causes of action in all M.D.L. 55 cases;

(2) Require each member of the classes who claims a right to participate in the Class Settlement Fund to execute and deliver, as part of his proof of claim, a release in the form contained in exhibits to the order;

(3) Bar forever the prosecution against the defendants or anyone else of any and all settled claims by any member of the classes, except by those who have opted out;

(4) Bar all members of the classes who opt out from instituting, maintaining or participating in any class action against anyone which asserts or relates to any or all of the settled claims. (This provision does not prevent those

who opt out from maintaining individual actions asserting their claims against anyone, including the defendants who are contributing to the settlement.);

(5) Provide that plaintiffs' attorneys of record in these class actions shall not in any proceeding or litigation represent any person who asserts against any defendant herein or anyone else any claim arising out of or relating to the subject matter of any of the settled claims; and

(6) Provide that the Court shall have and retain jurisdiction to allow attorneys' fees and disbursements to plaintiffs in the class actions and their counsel, and to deal with matters relating to the class settlement and plan of distribution.

The order and the notice also (1) set a date and method by which members of the classes who desired to be excluded therefrom in these class actions might opt out; and (2) set a date and place for a hearing (a) to determine whether the proposed settlement and the plan of distribution are fair, reasonable, equitable and adequate, and should be confirmed, (b) to pass on applications for fees and allowances in connection with the settlement, and (c) to take other action contemplated by the order.[35]

The Trustee duly mailed the notice and proof of claim forms (16,199 in all) to each member of the classes whose identity and address was known to him or whose name was furnished to him by any of the parties, and furnished on request 12,000 additional copies to various persons, firms and corporations, including securities brokers, and caused

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35. The order also contained certain conditions (which are no longer important), housekeeping provisions, and provisions with respect to the rights and obligations of the defendants inter se.

said notice to be duly published in The Wall Street Journal.[36]

On or before November 9, 1972, approximately 2,539 proofs of claim had been received by the Trustee, representing claims (which have not yet been processed) aggregating approximately $22,565,264.

The Trustee mailed forms for requesting exclusion from the classes to each person who asked for them.

Twelve written requests for exclusion from the classes[37] were filed with the Clerk on or before November 1, 1972. Such persons appear to have aggregate potential claims of approximately $500,000, and have effectively exercised their right to be excluded from the classes. No other requests for exclusion from the classes had been filed with the Clerk through November 15, 1972, except one ambiguous set of papers filed by counsel for the Bank of America, as trustee of a trust, which will be considered by the court at a later date.

All conditions of the proposed settlement set forth in the order were met or waived except matters to be performed after final judgment herein.

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36. At the request of various defendants in the class actions who are also defendants in certain other actions relating to transactions in the securities or commercial paper of the Four Seasons companies, the Trustee timely served by registered mail a copy of the order and its exhibits, including the notice annexed thereto, upon all named plaintiffs or third party plaintiffs in the seventeen transferred, tag along, or related actions. The Trustee forwarded all inquiries from members of the classes and others to counsel designated by the court for reply.

37. Most of which were substantially in the form attached to the order but some of which were in the form of letters and telegrams.

Hearing on Confirmation of Settlement

On November 16 and 17, 1972, the hearing called for by the order and notice was held. No persons appeared at the hearing and objected to the proposed settlement except Edward I. Cohen, Esq., representing himself and seven other persons claiming to be members of one or both of the classes, none of whom has requested exclusion from the classes, and who appear to have aggregate claims, computed in accordance with the order, of approximately $300,000. No other member of either of the classes objected to the proposed settlement at or prior to the hearing, either orally or in writing; but one man, who was a selling shareholder in the November 1968 public offering of America and who has filed no claim in the Chapter X proceedings, objected to the proposed settlement without stating any reason for his objection.

At the hearing the evidence offered in support of the proposed settlement included, inter alia, the entire court file and record in this M.D.L. 55 proceeding,[38] and, in addition, a copy of the Second Amended Plan of Reorganization (Restated), the Advisory Report of the SEC on Proposed Plan of Reorganization, a copy of the order in the Chapter X proceedings confirming the Second Amended Plan of Reorganization (Restated), and the order and opinion of the court in the Chapter X proceedings approving the compromise of the Class G claims.

The court admitted all evidence offered and not withdrawn voluntarily by counsel for objectors, including a

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38. Encompassing the transcripts of pretrial hearings, testimony, documentary exhibits, answers to interrogatories, pleadings, statemnets of positions, and briefs.

report of investigation by the American Stock Exchange (Amex).[39]

The court also admitted, at the request of proponents and without objection, separate replies by Walston & Co., Inc., and Frank Crimmins to the Amex report, and a verified "response" filed by counsel for Sher and Ginsberg, for the purpose of correcting certain alleged "errors and misconceptions" in the memorandum filed by Cohen.

Counsel for the trustee in the Chapter X proceedings stated to the court (a) that the trustee supported and recommended approval of the proposed settlement, and (b) that the SEC had advised him that it would appear at the November 21, 1972, hearing in the Chapter X proceedings on the Joint Application for Authority to Compromise Controversy and that it would announce that it had no objection to the proposed settlement.

Counsel for Fetman, for Fink, for Sher, for Andersen, for Clark and for Walston had submitted memoranda in support of the settlement; Cohen had submitted a memorandum in opposition; and one or more reply memoranda had been filed. All had been read by the court before the hearing. All counsel who wished to argue orally were heard.[40]

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39. In his brief, Cohen referred to certain facts which he had learned and which he assumed had not been considered by counsel for the plaintiffs in the class suits. He was mistaken in his assumption.

40. Cohen urged, inter alia, that the court require the defendants who are contributing to the settlement to state and make public the amount each of them is contributing. At the hearing on September 21, 1972, the court was told by counsel and was convinced that secrecy with respect to the amounts the several defendants had agreed to contribute was a sine qua non of the settlement. Assuming that such disclosure may ordinarily be required, the court is satisfied that it should not be required in this case, for reasons which should not be set out while individual actions against various defendants are still pending.

Counsel for plaintiffs who had submitted fee applications were heard and were questioned at length by the court.

Subsequent Proceedings

On October 31, 1972, the trustee had filed in the Chapter X proceedings the "Joint Application for Authority to Compromise Controversy". On November 21, 1972, after I had stated on November 17 that I would confirm the settlement, Judge Eubanks confirmed the settlement of the trustee's claims by an order entered in the Chapter X proceedings, after a hearing at which no objection was made to the confirmation of the settlement.

A final judgment, confirming the settlement of the class actions in M.D.L. 55, was signed on November 30, 1972, and entered on December 4, 1972.

Reasons for Approval and Confirmation of Settlement

In *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2 Cir. 1971), the Court set out the legal standards to be considered in determining whether a settlement should be approved, by quoting Judge Wyatt's statement in the court below, as follows:

> "Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.
>
> "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the

amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and to 'form an educated estimate of the complexity expense, and likely duration of such litigation * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise'. The Supreme Court then emphasizes: 'Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.' The quotations are from Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. [414,] 415, 424-425, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) [[D.C.,] 314 F.Supp. [710,] at 740-741]." 440 F.2d at 1085.

The Amount of the Settlement. As we have seen, the settlement provides the following benefits for class members, before fees: (a) $7 million in cash; (b) $500,000 (being one-third of the $1.5 million received by the Trustee in the settlement[41]); (c) the value to members of the classes of the reduction in the amount of the claims of those persons who benefit by Walston's agreement not to attempt to collect some $500,000 of balances due Walston from class members (since the total claims will probably exceed $100 million, this will represent a reduction in claims of about

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41. At the hearing, the Trustee refused to commit himself as to whether the $1,500,000 would be distributed promptly as a dividend on the Anta stock, one-third of which will presumably be held by the same persons who are members of one of the classes for whose benefit the M.D.L. 55 class actions have been brought. In the November 21, 1972, order in the Chapter X proceedings, the court directed that this be done.

one-half of 1%, and will benefit other class members to that small extent); and (d) the release of about $1 million of claims against the debtor estates, which will benefit class members as holders of one-third of Anta stock to the extent of about $350,000.

These items add up to about $8 million, which is a large sum of money. The total settlement has been said without contradiction to be one of the largest ever paid in a securities case. On the other hand, $8 million dollars is less than 8% of the Class G claims filed in the Chapter X proceedings, and therefore of the presumed amount which will be proved by class members herein.

The Class G claimants will also receive (assuming the approval of the reorganization plan in the Chapter X proceedings is affirmed on appeal) one-third of the stock of Anta, estimated to be worth $10 million, and the Trustee has testified that in his opinion a prompt settlement of the Trustee's claims will benefit Anta in various ways (outlined at the hearing) and should therefore benefit the class members.[42] For example, the loss carryover, estimated at $23 million, which Anta will enjoy for a time, would provide a dowry for the prospective "bride" in a possible early merger, benefiting the class members who, as Class G claimants in the Chapter X proceedings, will receive shares of Anta stock.

Likelihood of Plaintiffs' Success. There is little doubt but that plaintiffs would be able to prove a prima facie case against many of the defendants under one or more of their theories. On the other hand, many of the defendants have

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42. The prompt receipt (1) of cash by class members who file their claims herein and (2) of stock by those who have filed Class G claims in the Chapter X proceedings is of some value, albeit difficult to estimate.

possible defenses.[43] The probability of plaintiffs recovering the full amount of their claims is doubtful.[44] Moreover, unless plaintiffs can hold the accountants liable, it appears that they cannot collect anywhere near the full amount of their

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43. E. g., counsel for Clark notes that in denying the $4 million claim of the State of Ohio in the Chapter X proceedings, Judge Bohanon found that "no misrepresentations were made to the State of Ohio, or others", and that his decision was affirmed on appeal. State of Ohio v. Four Seasons Nursing Centers of America, Inc., 465 F.2d 25 (10 Cir. 1972). Counsel for Clark argues that the quoted finding "necessarily encompasses a judgment that in providing its financial statements for the six months ended December 31, 1969, to the State of Ohio, America did not misrepresent its financial condition at that period", and that, "because those financial statements were premised on the independence of Equity and showed substantial receivables due to America from Equity, Judge Bohanon's finding also indicates that America did not misrepresent Equity's independence". Even though the decision on appeal may be read more narrowly than counsel for Clark reads it, there is force in the argument that the finders of fact in the M.D.L. 55 cases may not find all necessary facts in favor of plaintiffs on many of their claims.

44. Harry A. Young, Jr., Esq., attorney for Fetman, et al., whom the court designated as liaison counsel for plaintiffs in connection with the settlement, stated his belief that plaintiffs would ultimately prevail on the merits, but candidly summarized the difficulties facing plaintiffs as follows:

> "Certain of the defendants have raised questions which are substantial in nature * * * [including] * * * statutes of limitations, measure of damages, class definitions, and that these consolidated cases are not susceptible to class action treatment * * *. There also would be at a later point in time questions of individual reliance (if reliance still is an issue) and individual damage suffered by the many thousands of class members, the proof of which * * * would be lengthy and difficult.
>
> "* * * the issues of accounting and market manipulation raised in the pleadings present numerous and complex issues and problems. * * *
>
> "All of the foregoing present substantial problems in trying these consolidated cases to a jury. It is very possible that if there were split trials in these consolidated actions, the trial on the issue of liability alone to a jury might take many, many months and subsequent trials or hearings on individual damages before a jury, special master, or a judge might literally consume years in view of the many thousands of potential claimants. There also are questions * * * as to

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claims.[45] The accountants have several defenses to the various charges, particularly to the only one which can be expeditiously handled, i. e. the claim based upon the single conspiracy theory.[46]

Footnote Continued—

whether any portion of any claimed loss might be attributable to general market conditions during the period preceding the Four Seasons reorganization proceedings, whether any portion of any loss suffered by the claimants is attributable to stocks of nursing homes in general losing favor with the public, and what percentage of any loss was attributable to the wrongful activities of the defendants in light of such other issues. All of the foregoing accounting and damage questions would require the opinion of numerous experts, whose opinions would undoubtedly conflict. * * *"

All of the defenses referred to by Young have been raised by defendants, who argue: that no general conspiracy has been established by the discovery to date, or, in fact, existed; that Equity was not a sham; that the stock of America was one of the "high flyers" on Amex, and that the price of 184 times reported earnings reached in 1969 was produced largely by the speculative fever which pervaded the market at that time, as shown by the fact that several nursing home stocks sold at an even higher price-earnings ratio. Defendants argue that the complex questions of fact and law (including reliance, causation, scienter, limitations, and complicated problems of proof and admissibility of evidence against the numerous defendants, absent the establishment of a conspiracy among them) would make recovery against defendants highly unlikely and result in an unmanageable proceeding. They also argue that even if liability were established, the ascertainment of the appropriate amount of damages recoverable by the possible classes and subclasses from the several defendants would further complicate and delay the ultimate disposition of the claims. See Feit v. Leasco Data Processing Equipment Corp., 332 F.Supp. 544, 586 (E.D.N.Y.1971). Cf. Esplin v. Hirschi, 402 F.2d 94, 104-105 (10 Cir. 1968), and the opinions in Chasins v. Smith Barney & Co., 438 F.2d 1167, 1169, 1174 (2 Cir. 1970-1971).

45. Objectors suggested that additional defendants be added, basing their suggestion on the assumption that they had unearthed additional facts. Substantially all of those facts were already known to counsel for Fetman, Fink, Sher and Ginsberg, who had decided that the suggested defendants should not be added; one was already a party.

46. Counsel for plaintiffs have espoused the theory that a conspiracy was entered into between defendants Clark, Bouse, Gray, some officers of Walston and some partners of Montgomery

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[1] *Classes and Subclasses.* Plaintiffs' other theories and claims would almost certainly require a considerable number of classes or subclasses. There are involved in this case the securities of America, Equity, FSN and Overseas, some of which were sold in the America private placement, some in the first America public offering, some in the second America public offering, some in the Equity private placement, some in the Equity public offering, and some in the after-markets following all of these offerings.[47] One or more of the possible classes could not be represented by any of the plaintiffs in the five class actions.[48] The issue of limitations is not the same for the several claims, and the availability of that defense in some of the situations presented is not clear. The issue of reliance is still very much up in the air with respect to several of the claims asserted. See *Affiliated Ute Citizens of Utah et al. v.*

Footnote Continued—

to raise and keep up the market price of America stock so that they could unload their holdings at a substantial profit. Such a theory makes sense, whether or not it could be proved. But when the conspiracy theory is expanded to include Andersen and other defendants, it becomes less plausible, more difficult to prove, and likely to split into several claimed conspiracies.

47. Andersen argues that there must be separate classes based upon the six audit reports it certified, because a person who bought stock before a later report was made public cannot say that he relied on the later report.

48. Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); Thaxton v. Vaughan, 321 F.2d 474 (4 Cir. 1963). This rule applies to actions arising under the Securities Acts. Greenstein v. Paul, 275 F.Supp. 604 (S.D.N.Y.1967), aff'd 400 F.2d 580 (2 Cir. 1968); Baseh v. Talley Industries, Inc., 53 F.R.D. 9 (S.D.N.Y.1971); Sanders v. Merrill Lynch, Pierce, Fenner & Smith, Inc., CCH Fed.Sec.L.Rptr. ¶ 93,226 at 91,409 (S.D.NY.1970); Puharich v. Borders Electronics Co., Inc., CCH Fed.Sec.L.Rptr. ¶ 92,160 at 96,728 (S.D.N.Y.1968); Cordova v. Bache & Co., 321 F.Supp. 600, 604 (S.D.N.Y.1970); Bluestein v. Friedman, CCH Fed.Sec.L.Rptr. ¶ 92,588 at 98,543-98,544 (S.D.N.Y.1970); DiJulio v. Digicon, 339 F.Supp. 1284, 1292-1293 (D.Md.1972). See generally Rule 23, F.R.Civ.P., and Advisory Committee Note, 39 F.R.D. 69, 99-100 (1966); 3B Moore's Federal Practice ¶ 23.04 (1969).

United States, et al., 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). That issue could hopelessly fragment the proposed class or classes.[49]

Likely Duration of Litigation. The shortest realistic estimate of the time within which the cases can be brought to trial is one year, provided the ultimate decision with respect to classes permits one or two trials on one or a few relatively simple theories of liability against individuals, partnerships and corporations. If that is not possible, by reason of the prosecution of various claims on various theories against various defendants or classes of defendants, with attendant rulings in this court and possible appeals, the time within which any of the cases can be brought to trial would probably be at least doubled. In either event there would probably be many cross-claims and third-party claims, which would be likely to extend the time even fur-

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49. Objectors suggested that the court should create a subclass of persons who purchased stock before it reached its zenith but failed to sell until later because of alleged misstatements or misrepresentations by defendants, despite the fact that such persons realized a profit and not a loss on the transactions in question. It is true that those facts would not make such persons a member of either class covered by the settlement agreement; but it would not be proper to create such a class in these cases. See DiJulio v. Digicon, 339 F.Supp. 1284, 1292 (D.Md.1972), where the court quoted the following statement from Marino v. Coburn Corp. of America, CCH Fed.Sec.L.Rptr. ¶ 92,959 (E.D.N.Y.1971) (Dooling, D.J.):

> "Yet if there is such a definable group of non-selling stockholders, it is all but impossible to envisage them as damaged in their investor interest by the fact of non-disclosure as distinguished from being damaged by reason of the fact that—whenever and however disclosed—the company had a heavy loss to shoulder in the immediate future. There is no indication that a press release which told everything that management knew and anticipated would not have at once brought about an adjustment of market price to a level at which existing stockholders would register the maximum loss in market value that could flow from such a disclosure."

Moreover, it is hard to see how such plaintiffs could constitute a manageable class, since the material facts with respect to each of them would be likely to differ.

ther. In view of the complexity and novelty of some of the points, there would probably be appeals from one or more final judgments, further extending the time when members of the class might expect to collect anything. Because of the nature of the claims against the several defendants and the probability of cross-claims and third-party claims, most defendants would need separate counsel. The cost of defense would be very substantial, and would affect the ability of some defendants to pay whatever judgments might eventually be recovered against them.

[2] *Expense of Continuing Litigation.* None of the plaintiffs in the class suits appears eager to finance the cost of continuing litigation, although at least two of them are well able to do so. None of them has objected to the settlement; all of them wish to accept it.[50] The objectors indicated that they did not wish to finance the further prosecution of the cases.[51] No one volunteered.

Recommendation by Counsel. It has been stated that a court should not substitute its judgment for that of the parties who worked out the settlement, in the absence of fraud, collusion or bad faith, or of evidence that the settlement, taken as a whole, is so unfair as to preclude judicial approval. See *Newman v. Stein*, 464 F.2d 689, 691-692 (2 Cir. 1972); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647 (7 Cir. 1971); *Glicken v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y.1964); *Zerkle v. Cleve-*

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50. None of them has paid anything toward the expenses incurred during the last two years by their counsel, in amounts of $31,022, $28,361.61 and $16,134 for the three separate groups.

51. They suggested that the Trustee in the Chapter X proceeding should do so. No order in this proceeding could require this action. The objectors did not make the suggestion in the Chapter X proceeding, where the Trustee, the creditors, the SEC and the court were satisfied with the settlement.

land-Cliffs Iron Company, 52 F.R.D. 151, 159 (S.D.N.Y. 1971).

[3] In *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 316 (S.D.N.Y.1972), Judge Bonsal stated that the court should give great weight to the fact that the lawyers for substantially all the plaintiffs and defendants who had been engaged in that arduous litigation for seven years unanimously supported the settlement. Here, the lawyers for the class plaintiffs have been engaged in this litigation for two and a half years, and all of the lawyers who have been actively engaged in the litigation support the settlement. The court must also consider, however, whether there was any fraud or collusion in arriving at the compromise.

No one suggests that there was any fraud or collusion in the ordinary sense. However, Cohen, for himself and the other objectors, states in his memorandum:

> "The Court is also requested to make an inquiry into the extent that the settlment reached was truly the result of adversary proceedings in which the protection of the interests of the Class G claimants was the primary concern of the attorneys representing that class. This statement is not meant to impeach the integrity of those lawyers who represented the class up to now. Rather, it is meant to suggest that, for one reason or another, perhaps, with respect to the settlement, their interests were not identical to those of the class."[52]

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52. Cohen's memorandum continued: "Out of a gross cash settlement to the class of $7,000,000 these lawyers have claimed $2,500,000 as fees and expenses. It is true that $7,000,000 is an objectively large sum, but it is a very small sum when compared to the estimated damages of $110,000,000. In this respect, it is difficult to see how the lawyers could have gotten significantly

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At oral argument, after he had heard from all attorneys for plaintiffs and defendants, Cohen softened his criticism. But whether or not the point is raised by any of the parties, the court should consider it in such a case as this, and has considered it in the light of everything which has been brought to the attention of the court from May 1971 to date and of all the points discussed herein.

The court concludes that the implied charge that counsel for Fetman, Fink and Sher did not act in the best interests of their clients and the classes in negotiating the settlement is not supported by the facts.

Failure of Other Members of Classes to Object. Not only the lawyers for the plaintiffs in the five class actions have approved the settlement, but the overwhelming majority of the members of the classes have in effect approved it, because (a) only twelve persons (or couples), having claims amounting to about one-half of 1% have opted out, (b) only seven persons (or couples) having claims of about one-third of 1% have objected, whereas (c) 2,539 proofs of claim totalling over $22 million had been filed herein as of

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Footnote Continued—

more money if the class had actually been completely compensated. It is true that the time and expense of further litigation would have raised the amount of their expenses, as well as the amount that constituted a 'reasonable fee'. However, the self-interest of the lawyers was certainly better served by an immediate settlement followed by an immediate payment than it would have been by insisting to a higher settlement which might not be agreed to. The latter course would only serve to delay the payment of an amount no bigger than that to which they now apparently feel entitled."

The court has not yet approved any fees for counsel, but will do so in a separate opinion, promptly after considering all evidence submitted and all memoranda, filed and to be filed, on the subject.

November 9, 1972, only about one month after the notice, with about two months remaining for filing claims.[53]

Manageability. The various theories, claims and contentions now advanced by plaintiffs will probably cause fragmentation of the proposed class or classes of plaintiffs for any purpose except discovery, and make these cases very difficult, if not impossible, to manage.

The pleadings and the further discovery which would be required if the settlement were not approved would be likely to increase the problems.[54]

The case has proved to be a Hydra, for when one problem is disposed of, two are likely to arise in its place, and the solution of cauterizing the wounds by settlement becomes desirable from the standpoint of the court system, as well as of all parties, if the proposed settlement is fair.

Conclusion

[4] The proposed settlement is fair, reasonable, equitable, adequate, and in the best interests of the classes.

The plan of distribution, including the administrative provisions thereof, is fair, reasonable, equitable, and in the best interests of the classes.

---

53. These figures are even more impressive when it is considered that seventeen investment companies and other corporations, having claims running from $1 million to $14.6 million, a total of over $53 million, about half of the total claims, have neither opted out nor objected to the settlement.

54. The case bristles with potential cross-claims and third-party claims. For example, Clark contends that he relied on the advice of Walston, Andersen and various prestigious law firms not now parties, and Walston, Andersen and other defendants contend that they relied on statements of Clark. If the court should, after further discovery, allow amendments to the complaints which would bring in other broker-dealers, the problems discussed would be compounded, and the number of classes for any purpose except discovery would almost surely become unmanageable.

As noted above, the court has already entered a judgment, signed on November 30, 1972, and entered on December 4, 1972, approving and confirming the proposed settlement and the plan of distribution and overruling the objections thereto.

AMENDMENT V

TO THE

CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE 23

OF THE

FEDERAL RULES OF CIVIL PROCEDURE

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims

or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

RULE 60

OF THE

FEDERAL RULES OF CIVIL PROCEDURE

RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one

year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

SUPREME COURT, U. S.

NOV 4 1974

MICHAEL RODAK, JR., C

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-379

STATE OF OHIO

Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER MONTGOMERY CO., and WALSTON & CO., INC.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals has not been published. A copy of that opinion appears at p. A1 of the Appendix to the petition for a writ of certiorari. The opinion of the district court is reported at 59 F.R.D. 667, and is also set forth at p. A22 of the Appendix to the petition. The supplemental opinion

of the district court is unreported, and appears at p. A52 of the Appendix to the petition.

QUESTION PRESENTED

The question which would be presented for review if a writ of certiorari were granted would be whether, where a federal court has

> (1) designated a class under Rule 23 of the Federal Rules of Civil Procedure pursuant to subdivisions (a) and (b)(3) of the Rule; and
>
> (2) issued notice to the class which not only fulfills the requirements of subdivision (c)(2) of the Rule but also informs of the terms of an impending class action settlement and judgment,

a class member who receives the notice and does not request exclusion or take any other action in response to the notice can, after approval of the settlement and entry of judgment under subdivision (c)(3) of the Rule, seek relief from the judgment on the ground that such class member was not adequately represented.

STATEMENT OF THE CASE

Beginning in June of 1970, a series

of class and individual civil actions were instituted in various federal district courts throughout the country alleging numerous violations of the federal securities laws in connection with transactions in the securities of Four Seasons Nursing Centers of America, Inc. ("Four Seasons") and Four Seasons Equity Corporation ("Equity") in the period from May of 1968 to mid-1970. Among the defendants were members of the boards of directors and management of both Four Seasons and Equity, the principal underwriter for two public offerings of Four Seasons stock and one public offering of Equity stock, the companies' auditors, and others. Among those sought to be represented by plaintiffs in the class actions were all persons who had in the foregoing period purchased securities of Four Seasons or Equity and suffered a loss thereon.

By certain decisions and orders of the Judicial Panel on Multidistrict Litigation, the first of which issued in May of 1971, most of these actions, including all the class actions, were transferred to the Western District of Oklahoma and assigned to Senior District Judge Robert C. Thomsen for coordinated or consolidated proceedings pursuant to 28 U.S.C. § 1407.*

During the sixteen months following

*The Panel's initial transfer decision is reported at 328 F. Supp. 221.

the initial transfer, discovery and other pretrial proceedings were conducted under the supervision of the transferee judge. These included extensive briefing and argument, at hearings held in the summer of 1972, on the issue of class determination. At the conclusion of these hearings, the transferee judge advised counsel that he would permit the litigation to proceed under Rule 23 on behalf of all those sought to be represented, divided into two classes: one consisting of all those who had purchased securities of Four Seasons (or various related companies), and the other of all those who had purchased securities of Equity. Counsel for the parties then advised the transferee judge that negotiations looking toward a class settlement were in progress and requested leave to pursue the negotiations, which was granted.

On September 21, 1972 the district judge signed an order (the "Order") which designated five of the pending actions as class actions maintained under Rule 23(b)(3) on behalf of the two classes and tentatively approved, for submission to the class members, a proposed monetary settlement.*

*The basic content of the Order, the background of the litigation, and the main events leading to the eventual approval of the settlement and entry of judgment pursuant thereto, are described in the district court's opinion approving the settlement, reported at 58 F.R.D. 19.

The Order approved and directed pursuant to Rule 23(c)(2) the issuance, by both individual mail and publication, of a notice to class members. The notice was mailed and published in accordance with the Order.

The Order provided and the notice advised, among other things, that any class member could be excluded from such class by filing on or before November 1, 1972 a written request for exclusion; that any class member who did not file such a request would be bound by any judgment entered in connection with the settlement proceedings; that any class member could enter an appearance in the proceedings; that a hearing respecting the proposed settlement (described in the notice) would be held on November 16, 1972; and that any person affected by the Order had a right to be heard at the hearing.

The State of Ohio, a class member, received individual notice by certified mail. It did not seek exclusion within the specified period or make any other response to the notice.

On November 30, 1972, pursuant to the Order and following approval of the settlement, the district judge signed a final class judgment. The judgment, which was entered in the Western District of Oklahoma on December 4, 1972 and not appealed from, bars all class members who did not request exclusion from prosecuting any of the claims defined in the Order as being settled. It thus bars

Ohio from asserting claims arising from its transactions in Four Seasons securities.

On December 21, 1972, Ohio filed a motion in the same proceedings to be relieved from the final judgment under subdivisions (1), (4) and (6) of Rule 60(b) of the Federal Rules of Civil Procedure. The district court granted the motion under Rule 60(b)(6). The Court of Appeals for the Tenth Circuit reversed and directed reinstatement of the judgment against Ohio.*

SUMMARY OF ARGUMENT

A writ of certiorari should not be granted since the decision below does not conflict with any federal decision respecting the effect of notice in a Rule 23(b)(3) class action and merely applies the principle of law embodied in Rule 23 that a class member in such an action who receives actual notice is bound by the judgment if he fails to seek exclusion within the time period specified in the notice. That rule is essential to insure the finality of class action judgments rendered after notice.

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*The opinions are referred to at pp. 1-2, infra.

ARGUMENT

I

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS ON THE SAME MATTER

The case of Hansberry v. Lee, 311 U.S. 32 (1940), cited by petitioner, did not involve a class action where, as here, notice to the class was given. In Hansberry, the Court had no occasion to decide, and did not address, the question whether a class member who receives notice and an opportunity to be heard is thereby accorded due process of law.

The same is true with respect to Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). As noted by the decision below, Gonzales involved a class action maintained under Rule 23(b)(2), in which notice was neither given nor required to be given.

Nor did this Court's recent decision in Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974) address the issue which would be presented in this case. The Court's statement in Eisen of what the Rule requires in order for a class action to be maintained obviously did not speak to the right of a class member who has received and ignored the notice to contend, after entry of the judgment, that adequacy of representation was not had. Indeed, petitioner's brief does not argue that the decision below was in conflict with Eisen.

Moreover, federal decisions have consistently enforced class judgments as to those class members who received notice. See Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th Cir. 1971); Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970); Supermarkets General Corp. v. Grinnell Corp., 59 F.R.D. 512 (S.D.N.Y. 1973), aff'd 490 F.2d 1183 (2d Cir. 1974); Mungin v. Florida East Coast R.R., 318 F. Supp. 720 (M.D. Fla. 1970), aff'd 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971).

Accordingly, the considerations set forth in Rule 19(b) of this Court respecting conflict in decisional law are not applicable to the instant case.

II

THE DECISION BELOW APPLIES A PRINCIPLE OF LAW EMBODIED IN RULE 23 AND ESSENTIAL TO THE FINALITY OF CLASS ACTION JUDGMENTS, AND THERE IS THEREFORE NO SPECIAL OR IMPORTANT REASON FOR REVIEW OF THE DECISION

Rule 23(c)(3) provides that a judgment entered in a class action under subdivision (b)(3) of the Rule shall include those to whom the notice given under subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. That provision is relied upon by both the federal judiciary and

parties to class actions in the federal courts as a basis for assuming that class action judgments will bind all those who have received notice pursuant to the Rule. The decision below, in holding that one who has received actual notice is bound by the judgment, confirms that assumption. It rejects an attempt by a single class member who has failed to respond to a class notice to avoid the judgment on the ground of a plethora of allegedly special circumstances, found by the court below to have been insufficient to demonstrate a denial of due process in view of the notice. Given the necessity for assuring finality in class judgments, we submit simply that no special or important reason for review of the decision is present.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: November 6, 1974

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-379

STATE OF OHIO,
Petitioner,

VERSUS

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

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November, 1974

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In the

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STATE OF OHIO,
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VERSUS

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Respondents.

BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

Respondent Arthur Andersen & Co. respectfully prays that this Court deny the State of Ohio's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") entered in this proceeding on August 13, 1974.

QUESTIONS PRESENTED

1. Whether the Tenth Circuit properly denied the State of Ohio ("Ohio") relief from the final judgment approving settlement of class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure pursuant to Ohio's motion under Rule 60(b) of such Rules when the Tenth Circuit found that—

(A) Ohio received the notice and order delineating the settlement and informing Ohio that—

(a) Ohio was a designated member of the class;

(b) Ohio had the opportunity to—

(i) opt out; or

(ii) be represented by counsel; and

(c) Ohio would be bound if it failed to opt out;

(B) Ohio stood by and did nothing until after final judgment was entered confirming the settlement, when it filed its motion under Rule 60(b) of the Federal Rules of Civil Procedure to be relieved from the operation of the final judgment; and

(C) Where due process is thus satisfied, adequacy of representation *need not be shown* as a matter of constitutional necessity (Emphasis added. Ohio App. A19); and that such conclusion was not in conflict with—

(a) *Hansberry* v. *Lee*, 311 U.S. 32 (1940); or

(b) *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974); or

(c) *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973).

2. Whether Ohio has shown special and important reasons which would warrant this Court's exercise of its power to grant certiorari?

SUPPLEMENTAL STATEMENT OF CASE

On September 21, 1972, the trial court signed an order in the class actions for the purpose of settlement which, among other things, defined the classes (one of which included Ohio), made the findings required by Rule 23(b)(3) of the Federal Rules of Civil Procedure (including a finding that the representative parties in these class actions would fairly and adequately protect the interests of such classes), approved the form of notice and directed the giving of such notice to the classes, permitted the class actions to be maintained as class actions, tentatively approved the proposed settlement, provided that members of the classes who desired to be excluded from the classes must elect to be excluded no later than November 1, 1972, and that each member who fails to timely request exclusion would be bound by any judgment or order, whether favorable or not, in connection with the settlement, and set a hearing on whether the proposed settlement should be finally approved to be held on November 16, 1972 (Andersen App. A1).

The notice (Andersen App. A28) was duly published and mailed with copies of said order and accompanying papers. In fact two copies of the order, notice and accompanying papers were mailed to Ohio, one addressed to the State of Ohio, c/o Attorney General, and the other to William Brown, Attorney General. The return receipts indicate that both mailings were delivered to the Attorney General of Ohio, one on October 6, 1972, and one on October 10, 1972 (Ohio App. 35).

The notice and order delineated the terms of the proposed settlement and informed Ohio that it was a desig-

nated member of the class, that it had the opportunity to opt out or be represented by counsel, and that it would be bound if it failed to opt out (Ohio App. A19).

No election to opt out was filed by Ohio (Ohio App. A10). The Final Judgment approving the settlement and barring prosecution of all settled claims against the M.D.L. 55 class action defendants or anyone else was entered on December 4, 1972, which, among other things, confirmed and made absolute, unconditional and final all of the findings and determinations made in the order of September 21, 1972 (Andersen App. A39).

Ohio took no appeal from the judgment, but on January 2, 1973, more than eighty-five days after receiving copies of the class action notice and order, Ohio filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure requesting relief from the operation of the Final Judgment (Ohio App. A10-11). The trial court granted relief, and the Tenth Circuit reversed.

REASONS FOR DENYING WRIT

I. The Decision by the Tenth Circuit Is Not in Conflict With the Decisions of This Court and the Decision of Another Circuit Relied on by Ohio.

A. Decision by Tenth Circuit

In analyzing the trial court's opinion, the Tenth Circuit determined that the trial court had granted Ohio relief from judgment because the trial court believed that under all the circumstances Ohio had been denied due process (Ohio App. A15-16). Upon its application of the due process tests to the total factual situation involved in this case, the

Tenth Circuit found that Ohio was accorded due process. The Tenth Circuit attached particular significance to the fact that Ohio was on notice as to the particular terms of the impending judgment and had a unique opportunity to judge for itself, retrospectively, whether Ohio's interests had been adequately represented at a time when Ohio was capable of excluding itself if not satisfied.

A close review of the relevant facts demonstrates the correctness of the Tenth Circuit's determination.

Since the settlement had already been negotiated and tentatively approved pursuant to Rule 23(c) of the Federal Rules of Civil Procedure prior to the time Ohio received notice, there was as a practical matter nothing further for the class representatives or their counsel to do except to perform the ministerial duties involved in effectuating the settlement such as processing claims and attending to minor details. Their responsibilities did not include any further effort to establish the merit of their asserted claims. Ohio could have accepted the settlement, or appeared by counsel of its own choosing and opposed the proposed settlement, or appeared by its own counsel and sought to have the settlement modified, or rejected the proposed settlement by opting out within the time prescribed and proceeded with its own independent litigation. It simply stood by and did nothing! The trial court held this to be inexcusable neglect (Ohio App. A40-43; F.R.D. 678-79). The Tenth Circuit agreed with that conclusion (Ohio App. A16).

The Tenth Circuit stated that in such a case "where due process is thus satisfied, adequacy of representation *need not be shown* as a matter of constitutional necessity." (Emphasis added. Ohio App. A19.)

B. *Hansberry* v. *Lee*, 311 U.S. 32 (1940)

Hansberry is not inconsistent with the Tenth Circuit decision. The state court decree which was denied *res judicata* effect and subjected to collateral attack in *Hansberry* was not entered as a class action under Rule 23 of the Federal Rules of Civil Procedure; it was a class suit in a state equity court, where no notice was required or given and no opportunity was afforded plaintiff to intervene or otherwise appear and be heard. In these circumstances, the Court felt impelled to—

> "examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such *notice and opportunity to be heard* as are requisite to the due process which the Constitution prescribes." (Emphasis added. 311 U.S. at 40.)

Since no notice had been given plaintiff of the state equity court proceeding, the Court turned to an examination of adequacy of representation, the only other element present which might have made the state equity court decree binding on plaintiff, and concluded that the interests of the plaintiff and the class representatives in the state equity suit were antagonistic, and that the "procedure and course of litigation" did not satisfy constitutional requirements.

In the instant case, notice to Ohio and the other class members was required and given, which fully informed Ohio of the terms of the settlement; Ohio could have opted out and not been bound by the judgment, or it could have appeared by counsel of its own choosing and availed itself of this opportunity to be heard. Instead, it did nothing until after final judgment. Such procedure and course of

litigation amply satisfied the requirements of due process as enunciated by this Court at 311 U.S. page 40 and quoted above.

In applying the normal "totality of the circumstances" due process test to this case, the Tenth Circuit found that Ohio was not entitled to relief under *Hansberry* and its progeny, and distinguished them as follows:

> "For we consider here an action in which Ohio not only received notice of its inclusion within the designated class, with a concomitant right to opt out, but one in which Ohio was also apprised of the very terms of the impending judgment. It was thus presented with the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied." (Ohio App. A18).

The holding of the Tenth Circuit is not novel and has well-reasoned scholarly support. B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 379-80 (1967); and F. Maraist & T. Sharp, *Federal Procedure's Trouble Marriage: Due Process and the Class Action*, 49 TEX. L. REV. 1, 9, 22-24 (1970).

C. *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974)

Ohio relies on a *statement* in *Eisen* to create an asserted conflict of decisions,[1] but, in its own petition admits that the question presented here is not the same question presented in *Eisen* (Ohio Pet. 14).

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[1] At page 14 of its Petition, Ohio quotes the following language from *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974):

> "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided."

As the Tenth Circuit noted:

> "The decision [in *Eisen*], however, preceded any judgment and concerned the question of whether the action could be maintained, and is thus . . . factually distinguishable from this controversy. Moreover, the Court speaks to the requirements of the *rule*, and not the Constitution." (Ohio App. A18 n. 11).

D. *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973)

In relying on *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973), Ohio has gone to great lengths in an attempt to demonstrate a conflict of decisions among the circuits. That attempt must fail, because *Gonzales* is readily distinguishable. As the Tenth Circuit noted:

> "In the *Gonzales* case, heavily relied on by Ohio, the Court took pains to point out that the action was maintained under 23(b)(2) and not 23(b)(3) with its special notice requirements and opt-out provisions. 'As a result of these distinctions class members in (b)(1) and (b)(2) actions must necessarily rely on the representative to protect their interest.' 474 F.2d at 74 n. 12." (Ohio App. A17 n. 9).

There is no conflict with *Gonzales*. Unlike the instant case which involves a class action under Rule 23(b)(3) which requires notice and the right to opt out or be represented by counsel of the class member's own choosing, Rule 23(b)(2), under which *Gonzales* was maintained, contains no such provisions and is similar to the procedure involved in *Hansberry*.

II. The Questions Presented Are Not Sufficiently Important to Justify This Court's Exercise of Its Power to Grant Certiorari.

While the *granting* of relief from a final judgment pursuant to Rule 60(b) in a class action suit after a settlement has been consummated in reliance upon the finality of such judgment might warrant the attention of this Court since it would discourage settlements of class actions[2] and tend to vitiate the 1966 revisions in Rule 23 of the Federal Rules of Civil Procedure designed to eliminate "one-way intervention" (Ohio App. A19-A20), the denial of such relief tends to encourage settlements (which the law favors) and the adverse determination binds only the person seeking the relief.

We submit that no special or important reasons have been shown or exist for this Court to concern itself in this case.

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[2] The First Circuit recently stated in an appeal involving a derivative action:

> "[W]here the party claiming the benefit of the rule [Rule 60(b), Fed. R. Civ. P.] is one member of a large class who received notice, an indulgent construction of the rule might unduly protract settlement proceedings. This suggests that 60(b) relief should rarely be given to any member of the class whose failure to appear at a hearing is due to mistake bordering on carelessness, or carelessness itself." *Greenspun* v. *Bogan*, 492 F.2d 375, 382 (1st Cir. 1974).

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to enter its Order denying the petition for a writ of certiorari.

Respectfully submitted,

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